In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Cross-Petitioner,

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

10, 11, 12, 13

Nos. ~~421, 422, 423, and 424~~.

BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

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TABLE OF ABBREVIATIONS.

For convenience we shall use the following abbreviations and designations:

Articles	The Articles of Incorporation of Citizens Gas (Part of Exhibit C to Bill, I R. 95-100).
Bill	Bill of Complaint.
Bonds	The First Consolidated Mortgage 5% Gold Bonds of The Indianapolis Gas Company issued under the Mortgage.
DX	Exhibit offered by defendants City of Indianapolis *et al.*, during trial.
DX Stip.	Stipulation Exhibit offered by defendants City of Indianapolis, *et al.*, during trial.
Franchise	The franchise contract between the City of Indianapolis and Alfred F. Potts, *et al.*, approved August 30, 1905 (Part of Exhibit C to Bill, I R. 81-95).
Lease	The Lease of September 30, 1913, from Indianapolis Gas to Citizens Gas (Exhibit B to Bill, I R. 51-80).
Mortgage	Indenture of Mortgage from Indianapolis Gas to Chase's predecessors, dated October 1, 1902 (Exhibit A to Bill, I R. 23-51).
PX	Exhibit offered by plaintiff during trial.
PX Dep.	Deposition Exhibit offered by plaintiff.
PX Stip.	Stipulation Exhibit offered by plaintiff during trial.
Pet.	Petitions for writ of certiorari and briefs in support thereof filed by the City of Indianapolis, *et al.**
.... R.	Printed transcript of the record.
Reply Br.	"Reply Brief of Petitioners to Briefs of Respondents in Opposition to Petitions for Writ of Certiorari."
Revenue Bonds	City of Indianapolis Gas Plant Revenue Bonds.
Stip.	Subdivision of Stipulation of Facts (PX 1, II R. 616-639, Offered II R. 326-7, Received III R. 1057).

* The City's petition and brief in Cause No. 421 is substantially identical with its petition and brief in Cause No. 422 and references to either petition and brief are equally applicable to the other, unless otherwise noted.

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BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

A.

OFFICIAL REPORT OF OPINIONS BELOW.

The District Court made findings of fact (III R. 1160) and conclusions of law (III R. 1190) and wrote an opinion (III R. 1122). The opinion has not been officially reported.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (IV R. 1281-1306) is reported in 113 F. (2d) 217. Its opinion on the first appeal (II R. 285-293) is reported in 96 F. (2d) 363; certiorari denied 305 U. S. 600.

NOTE: In the interest of brevity the parties will be referred to as follows:

The Chase National Bank of the City of New York, Trustee, respondent in causes 421 and 422, cross-petitioner in causes 423 and 424, and plaintiff in the trial court, as "Chase" or as "plaintiff";

(Continued on page 2)

B.

JURISDICTION.

The City filed petitions for certiorari (Nos. 421 and 422) on the 12th day of September, 1940. On the same day Chase filed a cross-petition for writs of certiorari (Nos. 423 and 424). In each petition the jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code (28 U. S. C. § 347(a)). These cases are now before the Court upon the granting of these petitions and the cross-petition.

The judgments of the Circuit Court of Appeals were entered on June 6, 1940 (IV R. 1307-8). The City's petition for a rehearing and its petition for a reargument were denied July 19, 1940 (IV R. 1336). The City's second petition for a rehearing was denied August 15, 1940 (IV R. 1405).

C.

STATEMENT OF THE CASE.

Plaintiff brought this action in the United States District Court for the Southern District of Indiana, suing as trustee under the Indianapolis Gas Mortgage and joining Indianapolis Gas, Citizens Gas and the City as defendants. All of the defendants were citizens of Indiana and federal jurisdiction was based on diversity of citizenship. Plaintiff sought to recover judgment for the overdue interest on the Indianapolis Gas Bonds, with interest on unpaid interest, against all the defendants and against the property once owned by Citizens Gas and later transferred by it to the City. Plaintiff also sought a declaratory judgment to establish that the Lease from Indianapolis Gas

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(Continued from page 1)

Citizens Gas Company of Indianapolis as "Citizens Gas";

The Indianapolis Gas Company as "Indianapolis Gas";

The City of Indianapolis and the members of the Board of Trustees and the members of the Board of Directors for Utilities of said City, collectively, as the "City";

The holders of Indianapolis Gas Bonds as "Bondholders."

to Citizens Gas (later assigned to the City), under which the lessee agreed to pay the interest on the Bonds, was and is binding on all the defendants and on the property transferred to the City by Citizens Gas.

The District Court denied plaintiff any relief except a judgment against Indianapolis Gas alone in the sum of $1,032,150, the amount of the unpaid coupons on the Indianapolis Gas Bonds at the time of the court's decree (III R. 1193). The Circuit Court of Appeals held that plaintiff was entitled to all the relief sought, but differed with plaintiff as to the rate of interest on the unpaid coupons and the rate to be paid on the judgment itself (IV R. 1305-6).

Most of the facts were established by a Stipulation in which all the parties joined (PX 1, II R. 616-639, Offered,* II R. 326-7).

The Indianapolis Gas Mortgage.

In 1902 Indianapolis Gas gave an open mortgage on its plant and property to one of plaintiff's corporate predecessors to secure an authorized bond issue of $7,500,000 (Bill, Exhibit A, I R. 23, Offered, II R. 327). Originally only $4,000,000 of Bonds were issued, but the Mortgage provided that additional Bonds could be issued to acquire additional property or make improvements and extensions (I R. 28). Under this provision of the Mortgage $833,000 of additional Bonds were issued prior to September 30, 1913 and $2,048,000 of additional Bonds were issued between June 22, 1914 and February 11, 1932 (Stip. 10, II R. 627). There are now $6,881,000 of Bonds outstanding, of which $120,000 principal amount are held by

* All of the exhibits offered by plaintiff on the trial (except PX 135, which was excluded) were admitted in evidence after the close of the trial by a formal order appearing at III R. 1057.

Indianapolis Gas and $18,000 principal amount by the City (Stip. 3(a), II R. 618).

The Mortgage contains a very broad after-acquired property clause (I R. 37) and all the property or rights which Indianapolis Gas might acquire after its execution are pledged under the Mortgage. The Mortgage also contains a covenant whereby Indianapolis Gas expressly agreed "to and with" the trustee that it would provide for and pay the principal and interest on the Bonds (I R. 44).

Organization of Citizens Gas Company.

On August 30, 1905 the City entered into a Franchise contract (Bill, Exhibit C, I R. 81-94, Offered, II R. 327) in which it granted the right to carry on the business of manufacturing and distributing gas to the City of Indianapolis and its inhabitants. This Franchise was granted on the express condition that the grantees thereof (three individuals) would organize an Indiana corporation to which the Franchise would be assigned and whose articles of incorporation would include certain specified provisions (I. R. 82).

Citizens Gas was organized in 1906 under the general laws of Indiana for the incorporation of manufacturing and mining companies. Its Articles (Bill, Exhibit C, I R. 95-100, Offered, II R. 327) contained the provisions required by the Franchise and the Franchise was assigned to it in May, 1906.

In pursuance of its Franchise Citizens Gas, starting with an authorized capital of $1,000,000 (I R. 96), acquired the necessary property to manufacture and distribute gas throughout part of the City of Indianapolis and began to conduct such a business. Although organized as a corporation for profit, Citizens Gas was a quasi-public corporation and held the property acquired by it

subject to a public charitable trust for the benefit of the inhabitants of the City of Indianapolis. *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855 (C. C. A. 7th, 1931).

Both the Franchise and Articles of Citizens Gas provided that its stock should be held by voting trustees who, in turn, would issue certificates of equitable ownership entitling the holders thereof to all dividends on their stock. The Franchise and Articles further provided that the City would be entitled to a conveyance of the "plant" of Citizens Gas upon the occurrence of certain events, among which were:

> (1) Whenever certificate holders had received the amount of their certificates plus a return of 10% per annum thereon (I R. 84).
>
> (2) Upon the expiration of the Franchise period the City could itself pay the certificate holders and require the conveyance of the property (I R. 93).

In 1921 Citizens Gas, in pursuance of the Indiana statutes authorizing it to do so, surrendered the Franchise previously granted by the City and accepted an indeterminate permit from the Public Service Commission, with the result that it operated from August 27, 1921, until September 9, 1935, as a public utility under an indeterminate permit (Stip. 6(b), II R. 622). At various times after its organization Citizens Gas increased the amount of its authorized common shares and sold additional common stock, authorized the issuance of and sold shares of preferred stock, and authorized various bond and note issues which were sold to the public for the purpose of financing and expanding its business (I R. 112-13, II R. 598-603). At the time when the City took over the property of Citizens Gas it had $2,000,000 of common stock, $1,000,000 of preferred stock and $2,745,000 of mortgage bonds outstanding (Stip. 16, II R. 634-5).

Lease from Indianapolis Gas to Citizens Gas in 1913 and Public Service Commission Approval Thereof.

In May, 1913, Citizens Gas and Indianapolis Gas filed a joint petition with the Public Service Commission requesting authority to make a lease of the property of Indianapolis Gas to Citizens Gas for a period of 99 years (PX Stip. 13, II R. 652-3, Offered, II R. 328, 331; Finding 38, III R. 1175). In the proposed lease the lessee agreed to pay the interest on the Bonds of Indianapolis Gas and a 7% return on the capital stock of Indianapolis Gas in the par value of $2,000,000 (PX 91, III R. 893, Offered, II R. 342). The considerations which led up to the making of this Lease are set forth in detail in the reports issued by Citizens Gas to its stockholders during the period when the petition was pending before the Public Service Commission and immediately following the Commission's approval of the Lease (PX 91, 92, 93 and 94, III R. 886-904, Offered, II R. 342). We quote only a few excerpts from these statements:

> "COMPETITION DANGEROUS TO THE COMPANY AND THE COMMUNITY.
>
> "Although the Citizens Gas Company has been able to compete successfully with its larger rival, and will continue to do so if necessary, *this competition has not been without dangers in the past, and may be found to be more dangerous in the future.** The old management of the Indianapolis Gas Company was bent on bringing the Citizens Gas Company into bankruptcy." (PX 91, III R. 887.)

And again:

> "Your Directors * * * have therefore carefully considered the interests of the Stockholders of the Citizens Gas Company under the operation of the proposed lease, and *they have concluded that there will be a large*

* Emphasis appearing in quotations throughout this brief is ours unless otherwise indicated.

profit therefrom which will enable your Company more quickly to reach the maximum dividend authorized and to pay off the accrued back dividends authorized, and to reduce the price of gas still further in this community." (PX 91, III R. 890.)

And again:

"* * * However, *it was possible to begin certain important economies soon after the merger became effective*, and these have already resulted in some net increase in your Company's profits after payment of all rental charges as well as your own bond interest." (Report to Stockholders, March 28, 1914; PX 93, III R. 902-3.)

After prolonged hearings before the Public Service Commission, it required certain modifications of the Lease, including a reduction in the rent so as to provide for a 6% rather than a 7% return on the capital stock of Indianapolis Gas. The parties agreed to these modifications and the Commission entered an order on October 1, 1913, approving the Lease as so modified (Stip. 7, II R. 623; Bill, Exhibit D, I R. 116-122, Offered, II R. 327).

Fishback intervention and petition for rehearing.

During the proceedings before the Public Service Commission one Frank S. Fishback filed an intervening petition in which he objected to the proposed lease. Fishback asserted that he was a stockholder of Citizens Gas and a resident freeholder of the City of Indianapolis and that he was objecting both as such stockholder and as such resident (PX Stip. 13, II R. 654, Offered, II R. 328, 331; Finding 38, III R. 1175). Fishback objected to the proposed lease on the following grounds among others (Bill, Par. 7, I R. 8-9; admitted by all defendants, I R. 137, 149, 223):

(a) That the rental provided therein was excessive.

(b) That Citizens Gas had no power to make such a lease because

(1) The proposed lease was for a period longer than the lessee's corporate life.

(2) The City of Indianapolis was the true owner of the lessee's property.

Following the approval of the Lease Fishback filed a petition for rehearing in which he contended (PX Stip. 13, II R. 659-60, Offered, II R. 328, 331; Finding 38, III R. 1175):

(1) That performance of the terms of the Lease would make it impossible for Citizens Gas to perform its contract with the City relating to the taking over of the property of Citizens Gas.

(2) That the City had not given its consent to the Lease.

(3) That Citizens Gas was not authorized to enter into such a Lease for a period of 99 years.

On November 28, 1913, this petition for rehearing was overruled and immediately thereafter Citizens Gas took possession and control of the plant and system of Indianapolis Gas (Stip. 8, II R. 624).

In these proceedings before the Public Service Commission the City of Indianapolis was duly served with notice to appear and did appear and participate through its duly authorized and appointed counsel. The City made no objection either to the execution of the Lease or to the order made by the Commission, and the City had never, down to the year 1935, sought to have the order of the Public Service Commission set aside or attempted to enjoin the enforcement thereof (Bill, Par. 8, I R. 9-10; admitted by all defendants, I R. 137, 149, 223).

Fishback's Suit to Enjoin Performance Under the Lease.

On November 28, 1913, the day when the Commission overruled his petition for rehearing, Fishback filed a suit to set aside the Commission's order and to enjoin the Commission and the parties to the Lease from carrying out the

provisions of the Lease. The Commission, Citizens Gas, Indianapolis Gas and the City were all parties to this suit (Stip. 9(a), II R. 624). In his pleadings in this suit Fishback asserted, among other things (PX Stip. 13, 14; II R. 648, 662; Offered, II R. 328, 331):

(1) That the City had not consented to the Lease (II R. 662, 665).

(2) That the rental and fixed charges to be paid were excessive (II R. 661, 664-5).

(3) That the obligations assumed by Citizens Gas under the Lease impaired the obligations of the contract between Citizens Gas and the City (II R. 665).

(4) That the Lease constituted such a lien and encumbrance upon the property and earnings of Citizens Gas that the City would not be able to acquire the Citizens Gas plant and system, as provided in its Franchise (II R. 666).

(5) That the trustees, directors and officers of Citizens Gas were not authorized to enter into such a Lease for a period of 99 years (II R. 668).

The City filed an answer in which it denied all of these contentions (Stip. 9(c), II R. 625).

Fishback brought this suit both as a resident of the City of Indianapolis and as a stockholder of Citizens Gas (PX Stip. 13, II R. 650, Offered, II R. 328, 331). As such resident he alleged that his rights as a beneficiary of the contract between the City and Citizens Gas were not being protected and that he was himself attempting to protect those rights.

This suit was not disposed of until February 15, 1921, when the court rendered judgment against Fishback (Stip. 9(c), II R. 625). During all of the period from 1913 to 1921 the City never joined with Fishback in asserting the invalidity of the Lease but, on the contrary, maintained its position in direct opposition to Fishback until the case was

disposed of.* Fishback carried the case to the Supreme Court of Indiana on appeal where the appeal was dismissed and a petition for rehearing denied in 1923. *Fishback v. Public Service Commission*, 193 Ind. 282; 138 N. E. 346, 139 N. E. 449. (Stip. 9(h), II R. 626.)

Representations by Citizens Gas as to Existence of 99 Year Lease.

There were $4,833,000 principal amount of Indianapolis Gas Bonds outstanding when the Lease was made. After Citizens Gas took possession of the Indianapolis Gas property it made various additions, extensions, and improvements to that property, and, in pursuance of the terms of the Mortgage and the Lease, Bonds of the Indianapolis Gas Company in the principal amount of about $2,000,000 were delivered to Citizens Gas to reimburse it for such expenditures. Citizens Gas sold these Bonds to the public and retained the proceeds of such sale. (Stip. 10, II R. 627.)

In the sale of these Bonds as well as in the sale of its own securities Citizens Gas represented that it had a 99 year Lease on the property of Indianapolis Gas and that it had guaranteed the payment of the interest on these Bonds.

We call the Court's attention to a few of the circulars used by Blodget & Co. in marketing Indianapolis Gas Bonds and securities of Citizens Gas. Mr. Baker, formerly a partner in Blodget & Co., testified that these circulars were prepared under his direction from information received from Citizens Gas and that it was the custom to send copies of the circulars to Citizens Gas for approval and correction (II R. 573). Thus, in 1921 the circular on which Indianapolis Gas Bonds were sold contained the following language (PX Dep. 3, II R. 592, Offered, II R. 420, 555):

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* The action was voluntarily dismissed by the plaintiff as against the City on the same day and by the same entry which entered final judgment against Fishback (Stip. 9(e), II R. 625).

"The Citizens Gas Company of Indianapolis, in 1913, *leased the property of the Indianapolis Gas Company for 99 years at a rental equivalent to the annual bond interest required*, and 6% on the $2,000,000 stock of the latter company. This lease was executed with the approval of the Public Service Commission of Indiana."

A similar representation was made in 1925 in the sale of the same Bonds (PX Dep. 4, II R. 595, Offered, II R. 420, 557):

"* * * The property of the Indianapolis Gas Company is *leased for 99 years* from 1913 for a sum equal to the interest on the outstanding bonds, and 6% on the $2,000,000 stock of the Indianapolis Gas Company."

The circular issued in 1926 left no doubt that Citizens Gas was guaranteeing the payment of interest and the refunding of the principal on the Indianapolis Gas Bonds (PX Dep. 5, II R. 596-7, Offered, II R. 420, 558):

"INDIANAPOLIS GAS COMPANY

First Consolidated Mortgage 5% Gold Bonds

Dated October 1, 1902 Due October 1, 1952

* * * * *

GUARANTEED BY CITIZENS GAS COMPANY OF INDIANAPOLIS AS TO INTEREST AND REFUNDING OF PRINCIPAL

The Indianapolis Gas Company was incorporated in 1890 to supply artificial gas to the city of Indianapolis and vicinity. *The property of the company is leased for 99 years from October 1913* to the Citizens Gas Company of Indianapolis which now controls the entire gas business of the city of Indianapolis and surrounding communities, serving a population of about 375,000. The Citizens Gas Company operates under an indeterminate permit of the Public Service Commission of Indiana."

There are many other instances of such representations which will be discussed later (*infra*, pp. 121-2).

Continuous Performance by Citizens Gas under Lease.

From November 28, 1913, to September 9, 1935, a period of almost 22 years, Citizens Gas operated the plant and property of Indianapolis Gas under said Lease, paid the interest on the outstanding Bonds of Indianapolis Gas either directly to the Bondholders or at the office of the Mortgage trustee, and paid all the other rentals payable *in cash* under the terms of the Lease, as well as the taxes upon the leased property (Stip. 11 (a), II R. 627-8). The plants of the two companies were operated as a single unit (I R. 156, II R. 349-50) and Citizens Gas was thus relieved from the waste and expense of competition and duplication of facilities.

During all this period neither the City of Indianapolis nor Citizens Gas ever suggested that the Lease was invalid or that there was any lack of power in Citizens Gas to make a lease for 99 years. On the contrary, on every occasion when the question was raised, both the City and Citizens Gas contended that the Lease was valid and was binding according to its terms. This occurred not only before the Public Service Commission and in the *Fishback* case, but in the *Todd* case, the *Cotter* case, and the *Williams* case, to which we shall refer hereafter.

Exercise by City of Right to Take Citizens Gas Property.

On March 20, 1929, the City of Indianapolis, through its Board of Public Works, adopted a resolution (PX Stip. 22, II R. 670, Offered, II R. 327) by which it

> "* * * hereby asserts, claims and demands *all rights, title, interests and ownership, of whatever nature or character* granted, reserved, transferred or vested in and to said City *in and to the gas plant, mains and property of said Citizens Gas Company* * * *."

and demanded that Citizens Gas

> "* * * convey *said plant, property and assets of said company* to said City of Indianapolis in accordance with the premises; * * *."

As we shall see (*infra*, pp. 101-4), the circumstances surrounding the adoption of this resolution, as well as the language of the resolution itself, show conclusively that the City intended at that time to take over all of the property of Citizens Gas, *including the 99 year Lease* of the Indianapolis Gas property.

The Todd and Cotter cases.

On April 30, 1929, Newton Todd, a stockholder of Citizens Gas, commenced an action in the federal court in Indianapolis to enjoin Citizens Gas from transferring its property to the City. About two weeks later a similar action was filed in the same court by Cotter and others, non-resident stockholders of Citizens Gas. The court dismissed both bills of complaint on May 29, 1930. On appeal the two cases were heard together and the judgments of the District Court were affirmed (46 F. (2d) 855). Subsequently this Court refused to grant a writ of certiorari (283 U. S. 852). In these cases the Circuit Court of Appeals held that the property of Citizens Gas was subject to a public charitable trust for the benefit of the inhabitants of Indianapolis and that the City, upon taking over the property of Citizens Gas, would become the successor trustee of this trust (46 F. (2d) 855, 864, 866).

The *Todd* and *Cotter* cases involved the right of the City to take over the property of the Citizens Gas, including the Lease in question, after the City's exercise of that right. In its answer in the *Cotter* case, the City said (PX 89, III R. 859-60, Offered, II R. 334, III R. 1057):

> "* * * after the passage of the Shively-Spencer Act of 1913 the Citizens Gas Company, pursuant to an order of the Public Service Commission of Indiana and *with the full consent and approval of the City of Indianapolis*, entered into a contract whereby it leased from the Indianapolis Gas Company all its plants and property *for a period of ninety-nine years*; * * *.
>
> * * * * *

"These defendants admit that since 1913 the Citizens Gas Company *with full knowledge and consent of the City* has operated the combined properties under the provisions specified by the Commission and has used its earnings and its financial credit in the making of extensions, improvements and betterments, both to its own property and to the property subject to said lease."

Similarly, in the *Todd* case the stipulation of facts signed by the various parties, including Citizens Gas and the City, and filed with the court, recited (PX 139, III R. 942, 943, Offered, II R. 335, III R. 1057):

"* * * Defendant Company [Citizens Gas] also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company, as created by a certain contract of lease for ninety-nine years dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana."

Questions Adjudicated in Williams Case.

On March 12, 1930, before the District Court had decided the *Cotter* and *Todd* cases, Allen G. Williams, an inhabitant and taxpayer of Indianapolis, brought suit as a beneficiary of the public charitable trust to protect it from the Lease, which he claimed to be burdensome. The following parties were joined as defendants: The City of Indianapolis and numerous officials of the City; Citizens Gas and a number of its officers; the Public Service Commission; Indianapolis Gas; and the trustees under the Indianapolis Gas Mortgage. Thus all of the parties to the present litigation were before the court (PX Stip. 35, II R. 761-4, Offered, II R. 328).

In his complaint Williams quoted in full the Franchise and Articles of Citizens Gas (II R. 765) and the Lease from Indianapolis Gas to Citizens Gas (II R. 780). Williams alleged (PX Stip. 35, II R. 761, Offered, II R. 328):

(1) That the Lease was "*ultra vires* said Citizens Gas Company" and wholly void (II R. 790, Par. 29).

(2) That the Lease "impairs the charter of said Citizens Gas Company" (II R. 780).

(3) That the Lease "impairs, also, the said contract of August 25, 1965, * * * whereby said Public Charitable Trust was created" (II R. 780-1).

(4) That the Lease was improvident and a burden upon the trust estate (II R. 780).

Williams declared that "said trust is now entitled to have made the formal and final transfer, accordingly, of all the property and franchises of said Citizens Gas Company" (II R. 771, Par. 14) and that the Lease should "be determined and adjudged to constitute an unlawful cloud upon the title of said Public Charitable Trust and should be removed by the proper decree of this court in this suit" (II R. 790, Par. 29).

Williams had been made a party to the *Todd* case and by stipulation filed in that case it was agreed that the *Williams* case would not be tried until the final determination of the *Todd* case (Stip. 13(f), II R. 629-30).

A number of defendants, including Citizens Gas and the City, filed a joint demurrer to Williams' complaint. Indianapolis Gas and the Mortgage trustees filed a separate demurrer, as did the Public Service Commission. The court sustained the demurrers and entered final judgment dismissing the complaint. (Stip. 14(d), (e), (f), (h); II R. 632-3).

On the appeal, the Supreme Court of Indiana considered the case on its merits, held the Lease to be valid, and affirmed the judgment of the lower court. *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212. No relief was granted in respect of the claim that the City was then entitled to receive the Citizens Gas property, this relief having been obtained in the *Todd* case. In disposing of the contention that the Lease was an unlawful cloud on the title of the public charitable trust, the court said (pp. 215-16):

"In respect to the alleged invalidity of the lease executed between the Citizens' Gas Company and the Indianapolis Gas Company, it appears from the complaint that *the lease was one which the Citizens' Gas Company and Indianapolis Gas Company had the power to execute and one which would result in great advantage to the Citizens' Gas Company.* * * *. Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it. *The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the commission in approving the same.*"

Williams' suit to protect and enforce the rights of the beneficiaries of the public charitable trust was decided after it had been judicially determined that the City was entitled to receive the trust property from Citizens Gas. The Supreme Court of Indiana held that the alleged burdensomeness or improvidence of the Lease was not a valid ground for the attack on the Lease, that Citizens Gas had power to make the Lease and that, although the City was entitled to receive the trust property, that property would have to remain subject to the obligations under the Lease.

Sale of Revenue Bonds by City of Indianapolis.

In its resolution of March 20, 1929 (*supra*, p. 12) the Board of Public Works reserved the right to furnish the funds to retire the stock of Citizens Gas, instead of having that company mortgage its property for the purpose of raising such funds.

The *Todd* case, filed as early as April 30, 1929, and the *Williams* case, not finally disposed of until April, 1934, interfered with the City's carrying out the resolution of March 20, 1929. However, on May 7, 1935, these suits in respect of the contemplated transfer of the trust estate having been brought to an end, the Board of Directors for

Utilities adopted a resolution for a public offering of $8,000,000 of the City's Revenue Bonds. This began by reciting the purpose of issuing said bonds as follows (PX Stip. 47, III R. 822-3, Offered, II R. 327):

> "That for the purpose of obtaining funds for the taking over of certain property *owned* by Citizens Gas Company of Indianapolis *and or in which it has an interest*, * * *."

The resolution later set out specifically the form of the Revenue Bonds to be issued. This form stated that the bonds were to be (III R. 825):

> "* * * issued for the purpose of providing funds for the purpose of taking over property *owned* by Citizens Gas Company of Indianapolis *and or in which it has an interest*, * * *."

The form of the bonds recited how they were to be secured as follows (III R. 826):

> "The payment of the principal and interest of this and of all other bonds of this issue is secured by a charge upon *all the revenue from the operation of all of the gas system* **owned and or operated** *by the City of Indianapolis.*"

Toward the end of the resolution the City made the following agreement (III R. 828):

> "The City agrees * * * that when it has obtained the possession of *the property operated by Citizens Gas Company* of Indianapolis, it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost, and maintained in good operating condition; and *it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas* in the City of Indianapolis * * *."

In connection with the public offering of the Revenue Bonds the City issued a prospectus which was produced and identified by Mr. Simond of Halsey, Stuart & Company (II R. 497-8). This prospectus (PX Dep. 110, II

R. 533, Offered, II R. 420, 518), was issued in May, 1935 and contained the following information for the benefit of prospective bidders (II R. 535):

> "For over twenty-one years gas has been supplied to the inhabitants of Indianapolis and neighboring communities solely through the system operated by Citizens Gas Company; a system having 867 miles of mains and with 75,949 meters in use as of May 1, 1935.
>
> "*This system is in part owned by Citizens Gas Company and in part is leased by it from Indianapolis Gas Company*, which is not an operating company.
>
> "* * *
>
> "*The lease is for a term of 99 years from October 1, 1913*, subject to a mortgage dated October 1, 1902, from Indianapolis Gas Company to Trust Company of America securing a 5% fifty year bond issue of $7,500,000 (not all of which bonds have been issued). *The rental thereunder is (a) the amount of the interest on the outstanding bonds under said mortgage*, and on any refunding bonds; * * *."

Thus the City expressly represented to the prospective bidders that the Citizens Gas property included the ninety-nine year Lease from Indianapolis Gas and that the leased property was included in "the system operated by Citizens Gas."

The Revenue Bonds were sold to Halsey, Stuart & Co. and Otis & Co., who relied upon the representations in the resolution of May 7, 1935, and the prospectus in making this purchase (II R. 493-4, 497-8, 456-7). In connection with the resale of the bonds, Halsey, Stuart & Co. issued an advertising circular, a copy of which appears as Exhibit B to the City's answer and counterclaim (I R. 192-9, Offered, II R. 327). This circular was submitted to and approved by Thompson, Rabb & Stevenson, counsel for the City of Indianapolis, before it was issued on July 1, 1935 (PX Dep. 111, 112, 113, 114, II R. 536-46, Offered, II

R. 420, 518). It contained, among others, the following representations:

(1) That said Revenue Bonds were issued to provide funds for the City to acquire the "property owned by Citizens Gas Company of Indianapolis and or in which it has an interest, * * *." (I R. 194).

(2) That Citizens Gas had "leased *for a period of 99 years* the properties and business of the Indianapolis Gas Company, thereby gaining control of the entire gas business of the City of Indianapolis and its environs." (I R. 195).

(3) That the Indianapolis Gas property covered by the Lease had a depreciated physical value of $9,181,960 and a reproduction value of $12,730,490, as against which there were outstanding $6,381,000 of Bonds and $2,000,000 of capital stock (I R. 195-6).

(4) That the City covenanted "That upon acquisition of the property operated by the Citizens Gas Company, it will cause the same to be continually operated as a gas system * * * and it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County * * *." (I R. 198).

(5) That "we are advised the coke oven and water gas plants of the leased property are not used in operations but it is anticipated that the coke oven plant will be in operation by October 1, 1935" (I R. 196).

The first, second and fourth of these representations were taken almost verbatim from the statements made by the City itself in its prospectus (*supra*, pp. 17-18), or from the resolution authorizing the sale of the Revenue Bonds (*supra*, pp. 16-17). Simultaneously with the publication of this circular, Halsey, Stuart & Company and Otis & Company published an advertisement in more than

forty newspapers throughout the country, which contained substantially the same representations as those in the circular (PX Dep. 104, 116; II R. 526, 547-8; Offered, II R. 420, 518).

Transfer of Citizens Gas Property, Including the Lease, to the City.

The City used some of the proceeds of the Revenue Bonds to retire the common stock, the preferred stock and the bonds of Citizens Gas. Then on September 9, 1965 Citizens Gas delivered to the City instruments transferring all of its property including the Lease. No cash was paid or any property transferred to Citizens Gas in return for the conveyance of all its property. On the contrary, the entire consideration for the transfer of the Citizens Gas property was paid to the stockholders and bondholders of Citizens Gas (Stip. 16, II R. 634).

The instruments of conveyance delivered to the City on September 9 were:

(1) A deed conveying all the real estate of Citizens Gas (PX Stip. 55, III R. 833, Offered, II R. 327).

(2) A transfer and assignment of the personal property (Bill, Exhibit E, I R. 122, Offered, II R. 327).

(3) An assignment of a lease of certain office space (PX Stip. 56, III R. 835, Offered, II R. 327).

(4) An assignment of the Lease here in question (Bill, Exhibit F, I R. 127, Offered, II R. 327).

Each of these four instruments specifically recited that the conveyance was made subject to all the existing liens and encumbrances on the Citizens Gas property *and subject to all other legal obligations* of Citizens Gas.

The four instruments of conveyance were all retained by the City and the City had three of them, *including the assignment of the Lease here in question*, filed for record

with the County Recorder (II R. 339, 467-8). The City immediately took possession of the Indianapolis Gas property and since September 9, 1935 it has continuously operated that property as a unified part of the entire system received from Citizens Gas (II R. 350; Stip. 6(c) II R. 622-3).

As a condition precedent to conveying its property to the City, Citizens Gas, by resolution of its Directors and Trustees (IX Stip. 86, 87; III R. 842, 845, Offered II R. 327), required that the City give an indemnity agreement of a specified form to Citizens Gas, and the City gave such an indemnity agreement (Stip. 21, II R. 638; Exhibit J to Second Amendment and Supplement to Bill, II R. 306, Offered II R. 327). By this Indemnity Agreement the City agreed to indemnify and save Citizens Gas harmless "from any and all loss, damage, costs, charges, *liability* or expense" on account of a large number of things, particularly including "any actions or suits which may hereafter be brought against said Company, arising from *any and all* acts or actions or *omissions to act* on the part of said company *of any nature whatsoever*" (II R. 307).

Thus we have a typical example of one corporation taking over all the assets and business of another corporation. The transferor is, of course, deprived of all resources with which to meet its liabilities and the transferee, therefore, takes the property subject to all existing obligations of the transferor and also agrees to indemnify the transferor against any liabilities of any kind whatsoever. That is precisely what occurred in the present case.

City's Performance Under the Lease.

Since September, 1935, the City has performed many of the obligations imposed upon the lessee under the terms of the Lease. Thus, it has continued to pay all the city, county, and state taxes on the Indianapolis Gas property (II R. 374, 377-9). It has continued to keep the property

of Indianapolis Gas insured (II R. 379), and, although it has done so quite inadequately, it has continued to spend some funds in the maintenance of the Indianapolis Gas property (II R. 380-81, 398-9). In addition to this the City furnished the money to pay the coupons falling due on October 1, 1935, and April 1, 1936, and paid $60,000 for dividends to the stockholders of Indianapolis Gas on December 31, 1935 (II R. 373, 375).

Proceedings in this Litigation.

On March 2, 1936, without any notice to the Mortgage trustee or the Bondholders (II R. 405-6, 408), the City and Indianapolis Gas entered into a written agreement which has never been modified or supplemented in any way (Stip. 19(a), II R. 637; Exhibit E to City's Answer, I R. 205, Offered as City's Exhibit B, II R. 386). This agreement provides that during the continuance of the agreement the City will make deposits in escrow in sums equal to the Lease rentals, including the amount of the interest due on the Indianapolis Gas Bonds. In direct violation of the rights of the trustee and of the Bondholders, however, the agreement provides that if the Lease is held to be binding on the City, the entire funds deposited in escrow, including those deposited in respect of the interest on the Bonds, shall be paid to Indianapolis Gas (I R. 206). The existence of this agreement came to the attention of the trustee and certain Bondholders some time later in March, 1936 (II R. 405-6), and in April, 1936 the Bondholders requested the trustee (Chase) to bring suit (PX 125, 126; III R. 937, 939; Offered, II R. 408). The Bill was filed on June 8, 1936, less than three months after plaintiff first learned of the agreement of March 2.

The District Court originally held that Indianapolis Gas should be realigned with plaintiff, thus destroying the requisite diversity of citizenship, and on November 15, 1937 dismissed the case for want of jurisdiction (I R. 271).

The Court of Appeals reversed this decision and remanded the case for trial (II R. 285; 96 F. (2d) 363). This Court denied certiorari (305 U. S. 600).

While the appeal was pending, certain Bondholders filed a wholly independent suit against those defendants who were made parties to Chase's Bill and also against the holder of the escrow fund. In this bill the plaintiffs, who hold Bonds aggregating almost $600,000.00 (Stip. 3(d), II R. 619), sued on behalf of themselves and all other Bondholders and asked for a personal judgment against Indianapolis Gas, Citizens Gas, and the City of Indianapolis for the unpaid interest on the Bonds and also asked, as Chase had, for a declaratory judgment holding that the Lease is a binding obligation of Indianapolis Gas, Citizens Gas, and the City.

In accordance with an order made by the District Court the two cases were tried together but not consolidated (II R. 325). All exhibits and evidence were considered as having been presented in both cases. This accounts for the designation of certain exhibits as "Plaintiffs' Exhibits," and certain other references in the record to "plaintiffs." The District Court has not yet decided the Bondholders' case.

In the trustee's case, the City renewed its attack on the court's jurisdiction, but the District Court upheld its jurisdiction (III R. 1192). On the merits, the court refused to grant plaintiff any relief against Citizens Gas or the City. The court held that the Lease was invalid and unenforceable against the City, Citizens Gas, Indianapolis Gas, or "the property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by said City * * *"; and that the decision of the Supreme Court of Indiana in the *Williams* case was neither *res judicata* nor a binding decision as to the law of Indiana which the court was required to recognize (III R. 1192 3). The court did,

however, give plaintiff a judgment against Indianapolis Gas in the sum of $1,032,150.00, the amount of the unpaid coupons on the Bonds (III R. 1193).

Separate appeals were taken by plaintiff and Indianapolis Gas. These appeals (Nos. 7143 and 7144) were heard together on the same record. The Court of Appeals reversed the judgment of the District Court and held (IV R. 1306):

> (I) That Chase is entitled to a coercive judgment for the overdue interest, with interest on overdue interest at 5%, against "(1) the City as successor trustee and the trust property; (2) Citizens Gas; and (3) Indianapolis Gas." (The amount due is now about $1,700,000.)
>
> (II) That "Chase is entitled to a declaratory judgment to the effect that the lease is valid and enforceable against the parties * * *."

The City filed a petition for rehearing (IV R. 1309) in which it asserted, among other things, that it had not been given its day in court on the issue of the alleged burdensomeness of the Lease and that there could be no federal jurisdiction of the case. The Court of Appeals denied this petition but modified its opinion in certain respects, taking pains to make it clear that the judgment to be entered would bind the City only in its capacity as trustee of the public charitable trust and not as a municipality (IV R. 1335-6). A second petition for rehearing (IV R. 1343) was also denied (IV R. 1405).

The City filed two petitions for certiorari (Nos. 421 and 422). Chase filed a cross-petition for writs of certiorari (Nos. 423 and 424). The case is now before this Court upon the granting of these petitions and the cross-petition.

D.

SPECIFICATION OF ERRORS.

Since Chase was plaintiff in the District Court and is a cross-petitioner here, it has been agreed by all parties that it is to file the first brief in this Court. Plaintiff will accordingly present not only the error upon which it relies, but also the reasons why the judgments of the Court of Appeals should be affirmed except as to the single error of which plaintiff complains. In this connection we will deal with the alleged errors upon which the City relies.

I. PLAINTIFF'S SPECIFICATION OF ERROR.

The single error upon which plaintiff relies is that the Circuit Court of Appeals should have allowed interest on the overdue coupons from the dates of their respective maturities, and upon the judgment to be rendered from the time of its entry, at the rate of 6% in each instance and not at the rate of 5%. Plaintiff claims this right under the clear language of the Indiana statutes. (As of October 1, 1946, the difference amounted to more than $30,000.00.)

II. CITY'S SPECIFICATION OF ERRORS.

The City's "Reasons Relied Upon for Allowance of Writ" are (Pet. 13-16):

First: That the City has been denied a hearing on the question of the alleged burdensome character of the Lease and has thus been denied due process of law. (See below, p. 45.)

Second: That the Court of Appeals should have realigned Indianapolis Gas with plaintiff, in accordance with the City's conception of their interests in a so-called "dominant controversy," without regard to their conflicts of interest in the other controversies. (See below, p. 38.)

Third: That the Court of Appeals refused to follow the law of Indiana:

(1) As to the estoppel of a city. (See below, p. 118.)

(2) On the question of *res judicata*. (See below, p. 74.)

(3) As to the proper interpretation of a grant made by a municipality. (See below, p. 56.)

(4) To the effect that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes. In this connection the City claims that certain Indiana statutes prohibited the Lease in question. (See below, p. 93.)

E.

SUMMARY OF ARGUMENT.

I. THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED TO REALIGN INDIANAPOLIS GAS WITH CHASE AS A PARTY PLAINTIFF.

(Brief, pp. 38-45.)

The decision of the Court of Appeals requires a judgment against Indianapolis Gas of over $1,700,000. A party *against* whom plaintiff is entitled to such a judgment should not be aligned *with* plaintiff. A defendant with whom the plaintiff has one or more controversies is never realigned with the plaintiff for jurisdictional purposes, and this rule applies without regard to whether plaintiff and such defendant are in accord as to some other phase of the same suit.

II. THE CITY HAD AMPLE OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER THE ALLEGED BURDENSOMENESS OF THE LEASE WAS A VALID DEFENSE AND THE COURT OF APPEALS' DIRECTION TO ENTER FINAL JUDGMENT WITHOUT A RETRIAL OF THAT ISSUE WAS IN FULL ACCORD WITH DUE PROCESS OF LAW.

(Brief, pp. 45-56.)

The City had ample opportunity to be heard on the question whether the alleged burdensomeness of the Lease was a valid defense, both in the trial court and in the Court of Appeals. The Court of Appeals was correct in determining this question of law adversely to the City's contentions and the City is not entitled to prove allegations which would be ineffectual as a defense even if they were proved.

The City admits that the order of the Public Service Commission approving the Lease is a conclusive determination that the Lease was "advisable and in the public interest" (Reply Br. 8). The *Williams* case* is a conclusive

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* *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212 (1934).

determination by the Indiana Supreme Court (both as *res judicata* and as a statement of the Indiana law) that the Lease would be binding upon the public charitable trust even if it were proved to be burdensome. Also, the law is well settled in Indiana that neither a party to nor an assignee of a contract or lease can escape his obligations thereunder by showing that they were originally or have become burdensome. Thus, the Court of Appeals was correct in holding that the City's allegations of burdensomeness presented no valid defense.

The right to prove allegations which would be wholly immaterial and ineffectual as a defense even if they were proved is not an element of due process of law.

III. THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT CITIZENS GAS HAD THE POWER TO EXECUTE THE LEASE AND MAKE IT BINDING UPON THE PUBLIC CHARITABLE TRUST FOR THE FULL TERM OF THE LEASE.

(Brief, pp. 56-74.)

The City concedes that the Lease was valid until the trust property was transferred to the City (I R. 145-6). The theory that a trustee's contract, valid when made, becomes voidable when his successor takes his place as trustee is obviously unsound. In fact, Citizens Gas had ample authority to execute the Lease and make it binding on the trust for the full term of the Lease.

(a) Citizens Gas Had Express Statutory Authority to Make the Lease for 99 Years.

(Brief, pp. 56-58.)

Section 95½ of the Public Service Commission Law* specifically authorized competing public utilities to merge by purchase or lease, "at a price and on terms fixed by the

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* The pertinent portions of this Law are quoted in "Appendix A" to this brief, *infra*, p. 142.

commission." The Lease here in question was one between competing public utilities and was "at a price and on terms fixed by the commission."

(b) The Franchise and Charter Powers of Citizens Gas Included the Power to Execute the Lease and Make It Binding Upon the Trust for the Full Term of the Lease.

(Brief, pp. 58-66.)

The fact that its Articles gave Citizens Gas no *express* power to buy or sell property, hire employees, or make leases does not negative the existence of those powers, since they are necessarily *implied* from its general authority "to supply the city of Indianapolis and its inhabitants with light, heat and power." The charter powers of an Indiana corporation are derived both from its articles and the general laws governing such corporation, so that the statutory provisions authorizing public utilities to make leases were an express grant of such power to Citizens Gas.

(c) The Express Statutory Power of Citizens Gas to Effect a Merger by Making the Lease For 99 Years Overrode the Limitations, If Any, Arising From the Public Charitable Trust.

(Brief, pp. 66-69.)

In the *Williams* case the Supreme Court of Indiana held that the rights of the beneficiaries of the public charitable trust are "subject to the power of the state to control the Citizens' Gas Company as a public utility." This power was exercised by the enactment of the Public Service Commission Law and by the Commission's approval of the Lease, pursuant to the provisions of that Law.

(d) The Williams Case Conclusively Determined That Citizens Gas Had Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

(Brief, pp. 69-70.)

The decision of the Supreme Court of Indiana in the *Williams* case that "the lease was one which the Citizens' Gas Company and Indianapolis Gas Company had the power to execute" is a binding adjudication between the parties and a controlling authority as to the Indiana law.

(e) The Practical Construction of the Franchise and Articles by the City and Citizens Gas Shows That Those Instruments Gave Citizens Gas Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

(Brief, pp. 70-74.)

Over a period of more than 22 years (from 1913 to 1935) the City and Citizens Gas consistently construed the Franchise and Articles of Citizens Gas as granting it the power to execute this Lease and bind the public charitable trust thereto for the full term of the Lease. This practical construction of these documents by the parties themselves is of great, if not controlling, significance as to their proper interpretation.

IV. THE VALIDITY OF THE LEASE AND ITS BINDING EFFECT ON THE PUBLIC CHARITABLE TRUST HAVE BEEN CONCLUSIVELY ESTABLISHED BY THE JUDGMENT IN THE WILLIAMS CASE AND OTHER DECISIONS.

(Brief, pp. 74-92.)

The decision of the Indiana Supreme Court in the *Williams* case, the order of the Public Service Commission approving the Lease, and the decision in the *Fishback* case conclusively determined every issue now presented by the City in its attack on the Lease.

(a) The Judgment in the Williams Case Conclusively Determined That the Lease is Binding on the Public Charitable Trust, on Citizens Gas as Initial Trustee, and on the City as Successor Trustee.

(Brief, pp. 75-90.)

Williams sued in behalf of the public charitable trust and made all the parties to the case at bar, including the initial trustee and the successor trustee of the public charitable trust, parties to his suit. The refusal of the Indiana Supreme Court to remove the Lease as an "unlawful cloud upon the title of said Municipal City, as trustee" is a conclusive determination that the Lease is a binding obligation of the trust, of the initial trustee and of the City as successor trustee.

The City presents no issues as to the binding effect of the Lease which were not adjudicated in the *Williams* case and the judgment in that case would be conclusive even if the City were relying on new grounds of attack. Likewise, the mere transfer of the trust property did not affect the conclusiveness of the decision that the Lease is a binding obligation of the trust. The obligations of a trust cannot be evaded merely by changing the trustee.

Williams, a beneficiary, was permitted to present the case on behalf of the trust. It makes no difference, therefore, what issues, if any, were raised between the trustee (the City) and its co-defendants. The City had the opportunity to support Williams's contentions. It elected to oppose them.

Entirely aside from the question of *res judicata*, the *Williams* case conclusively settles the law of Indiana as to the very facts now presented to this Court.

(b) The Order of the Public Service Commission Conclusively Determined That the Lease Is in the Public Interest (Consequently in the Interest of the Trust Also) and in Fulfillment of the Duties of Citizens Gas as a Public Utility.

(Brief, pp. 90-92.)

The City admits that the Public Service Commission has conclusively determined that the Lease "was advisable and in the public interest" (Reply Br. 8). The Lease must, therefore, be in the interest of the beneficiaries of the public charitable trust—"the public." The Commission's decision is also a conclusive determination that the Lease was in fulfillment of the duties of Citizens Gas as a public utility and, therefore, superseded any limitations (in fact there were none) which might have been involved in the existence of the trust.

(c) The Fishback Case.

(Brief, p. 92.)

The decision in the *Fishback* case is *res judicata* between Indianapolis Gas and Citizens Gas. The primary importance of this case lies in the conduct of Citizens Gas and the City in upholding the validity of the Lease during the eight years immediately following the execution of the Lease, before the trial court entered final judgment.

V. THE CITY HAD AMPLE AUTHORITY TO ACCEPT THE TRUST AND ITS OBLIGATIONS, INCLUDING THE OBLIGATIONS UNDER THE LEASE, AND TOOK THE NECESSARY ACTION TO EXERCISE THAT AUTHORITY.

(Brief, pp. 93-117.)

The statutes* which the City asserts "prohibit any such lease" as the one here in question have no application to this case. The City had ample authority to take over

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* These statutes are quoted in full in "Appendix B" to this brief, *infra*, p. 147.

the public charitable trust and all its accompanying obligations, including those under the Lease, and took proper steps to exercise that authority.

(a) The City Had Ample Authority to Accept the Trust and Its Accompanying Obligations, Including the Obligations Under the Lease.

(Brief, pp. 93-98.)

Under Section 53 (clause 6) of the Cities and Towns Act the City had express power to accept trusts and "to agree to conditions and terms accompanying the same." This power is not subject to the limitations on the City's ordinary governmental powers. Moreover, the "validating acts" of 1929* conferred express authority on the City to accept the very trust here in question, including the leasehold estate and its accompanying obligations. Indeed, the "validating acts" were prepared and their enactment procured by the City's counsel for this very purpose.

(b) The City's Acceptance of the Trust Property Included the Acceptance of the Leasehold Estate and the Obligations Under the Lease.

(Brief, pp. 98-107.)

The City admits that it took over *all* the trust property (I R. 243). Since it also admits that the Lease was valid during the trusteeship of Citizens Gas (I R. 145), the leasehold must have been part of the trust property taken over by the City. The fact is that in March, 1929 the City demanded the transfer of *all* the trust property, including the leasehold estate, and during the succeeding six years consistently construed this demand as including a demand for the transfer of the Lease.

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* The pertinent portions of the "validating acts" are quoted in "Appendix C" to this brief, *infra*, p. 150.

(c) The City Accepted the Assignment of the Lease, Took Possession of the Leased Property and is Liable by Privity of Estate For the Obligations Under the Lease.

(Brief, pp. 107-111.)

The City received an assignment of the Lease, had it recorded, and took possession of the leased property, thereby becoming an assignee of the Lease. Its *ex parte* resolution *saying* that it rejected the assignment of the Lease is meaningless in view of its *acts* whereby it accepted the assignment. Also, the City had no agreement with Indianapolis Gas authorizing the City to take possession of the leased property. It had the right to take possession only as *assignee* of the Lease.

(d) The City Became Liable, as Successor Trustee, for All the Obligations of Citizens Gas, Including the Obligations Under the Lease.

(Brief, pp. 111-117.)

The City admits that it took the property of Citizens Gas "subject to all outstanding legal obligations of that Company" (I R. 243) and that the Lease was valid during the 22 years before the City received the trust property (I R. 145). This necessarily means that the obligations under the Lease were included among those to which the property was subject in the hands of the City. The City, as successor trustee, became liable for *all* the obligations of Citizens Gas in three ways: (1) by accepting the instruments transferring the trust property, all of which were expressly made subject to *all* the obligations of Citizens Gas; (2) by giving Citizens Gas an Indemnity Agreement, in which the City agreed to protect Citizens Gas from all *liability* arising from any acts or omissions to act on the part of Citizens Gas; and (3) by taking all the assets of Citizens Gas and paying the consideration therefor to the stockholders and bondholders of Citizens Gas, leaving it with no property out of which to satisfy its obligations.

VI THE CONTINUED ACQUIESCENCE IN THE VALIDITY OF THE LEASE BY CITIZENS GAS AND THE CITY FOR 22 YEARS, THEIR ACCEPTANCE OF THE BENEFITS UNDER THE LEASE, AND THEIR REPRESENTATIONS AS TO ITS BINDING EFFECT ON THE TRUST PRECLUDE BOTH OF THEM FROM ATTACKING THE LEASE.

(Brief, pp. 118-132.)

Although the Court of Appeals made no decision on the question of estoppel *in pais*, it would have been fully warranted in holding that both the City and Citizens Gas are estopped to deny that the Lease is binding for its full term.

(a) Citizens Gas is Estopped by its Conduct From Denying That the Lease is Valid for its Full Term.

(Brief, pp. 120-124.)

Before the Public Service Commission, in the *Fishback* case, and in the *Williams* case, Citizens Gas insisted that the Lease was valid for its full term and in each instance this contention was sustained. Also, Citizens Gas represented to the investing public that it had a 99-year Lease on the property of Indianapolis Gas, under the terms of which it guaranteed the interest on the Indianapolis Gas Bonds. There can be no doubt that as a result of these representations the general public was not only induced to buy the $2,000,000 of Indianapolis Gas Bonds sold by Citizens Gas, but also to continue to hold all the outstanding Bonds.

(b) The City is Estopped by Its Own Conduct From Denying That the Lease is Valid For Its Full Term.

(Brief, pp. 124-129.)

From 1913 to 1935 the City both actively urged and represented and stood by with full knowledge while Citizens Gas represented that the Lease was valid and bind-

ing for its full term. On several occasions when beneficiaries of the trust attacked the Lease the City not only failed to join in the attack but affirmatively insisted that the Lease was valid. As late as June, 1935 it sold its Revenue Bonds upon the express representation that it was taking over the entire system operated by Citizens Gas, including the property leased from Indianapolis Gas.

(c) The City is Precluded by Its Own Laches and the Laches of Citizens Gas From Denying That the Lease is Valid and Binding For Its Full Term.

(Brief, pp. 129-132.)

Citizens Gas and the beneficiaries of the trust had all the benefits of the Lease for a period of 22 years before the City asserted that the Lease was no longer binding. Moreover, during this period the City was a party to several proceedings in which it was incumbent on the City to speak if it ever intended to repudiate the Lease and in each instance the City failed to speak or took the affirmative position that the Lease was a binding obligation of the public charitable trust.

VII. THE RULE OF ERIE RAILROAD COMPANY v. TOMPKINS REQUIRED THE DECISION MADE BY THE CIRCUIT COURT OF APPEALS AND THE COURT FULLY COMPLIED WITH THAT RULE.

(Brief, pp. 132-134.)

Every Indiana decision bearing upon the validity of the Lease compels the conclusion that it is valid for its full term. The City's *present* contentions as to the validity of the Lease were all conclusively negatived, *as a matter of Indiana law*, in the *Williams* case.

VIII. THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT PLAINTIFF'S JUDGMENT SHOULD INCLUDE INTEREST ON THE COUPONS AFTER THEIR MATURITY AND INTEREST ON THE JUDGMENT ITSELF, BUT IN EACH CASE THE RATE OF INTEREST SHOULD BE SIX PER CENT.

(Brief, pp. 134-138.)

Under the express provisions of the Indiana statutes plaintiff is entitled to interest at the rate of six per cent on (1) the overdue coupons from the dates of their respective maturities, and (2) the judgment itself. The fact that the Bonds bear interest at the rate of 5% is wholly immaterial with respect to the proper rate of interest on the overdue *coupons* and on plaintiff's judgment.

F.

ARGUMENT.

I. THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED TO REALIGN INDIANAPOLIS GAS WITH CHASE AS A PARTY PLAINTIFF.

In the Court of Appeals the City raised no question as to federal jurisdiction of this case until its first petition for rehearing. It was content with federal jurisdiction so long as the decision on the merits was in its favor. The Court of Appeals having decided the merits against it, the City is once more raising the question of jurisdiction which was determined adversely to it by the Court of Appeals in April, 1938. *Chase National Bank, Trustee v. Citizens Gas Co.*, 96 F. (2d) 363 (H R. 285).

After the Court of Appeals sustained federal jurisdiction of these cases in 1938, the City filed a petition for a writ of certiorari, which was denied (305 U. S. 600). Both in the Court of Appeals and in this Court the City argued, as it is now arguing again (Pet. 11-12), that

> "* * * the attitude of the respective parties toward the essential, substantial controversy, should determine whether realignment shall take place for the purpose of testing the jurisdiction of the court as a federal court; irrespective of the attitude of the parties toward subsidiary or different issues." (Supporting Brief, p. 16, case No. 168, 1938.)

The Court of Appeals denied that there was any such test for determining when realignment should be required, saying (96 F. (2d) 367, H R. 291):

> "* * * A perusal of these authorities discloses that such realignment has been required when there is no actual controversy between plaintiff and defendant, or no bona fide prayer for relief against it. * * * The rule seems to be that *before such realignment may be required, the parties must be in substantial accord upon all issues presented. Boston Safe-Deposit & Trust Co. v. City of Racine*, C. C., 97 F. 817. It is not

sufficient that they merely be in accord upon one issue or some of the issues."

In the case at bar the District Court gave plaintiff a judgment against Indianapolis Gas for $1,032,150 (III R. 1193). The decision of the Court of Appeals requires a coercive judgment *against Indianapolis Gas* for approximately $1,700,000. It is inconceivable that a party against whom plaintiff is entitled to recover such a judgment can be aligned with the plaintiff under any circumstances.

The City's argument is based entirely on the fact that the City, as successor trustee, has been held primarily liable and Indianapolis Gas secondarily liable for the amount of the judgment, and that the City is well able to pay the judgment out of the funds of the public charitable trust (Pet. 11). A parity of reasoning would require a realignment whenever a creditor sues a principal and surety on a debt. No such realignment is required.

It is clear under the authorities, particularly in Indiana, that this case itself involves a principal and surety relationship. The situation here is substantially the same as that when a mortgagor sells the mortgaged property to a third person, who agrees to pay the mortgage debt. In such a situation the mortgagor becomes the surety, and the grantee of the mortgaged property becomes the principal debtor.

Union Mutual Life Insurance Co. v. Hanford, 143 U. S. 187 (1892);
Birke v. Abbott, 103 Ind. 1, 1 N. E. 485 (1885);
Todd v. Oglebay, 158 Ind. 595, 64 N. E. 32 (1902).

The relationship of principal and surety is similarly involved where, as in the case at bar, the mortgagor merely leases the property to a third person, who in turn agrees to pay the interest on the mortgage as rent. Thus, in *Central Trust Co. v. Berwind-White Coal Co.*, 95 Fed. 391 (1899) the court had such a situation before it and said (pp. 395-6):

> "* * * The fact that the parties were lessor and lessee, instead of being vendor and vendee, and that a sum equal to the interest only was to be paid by the lessee to the mortgagee, instead of its principal, makes no difference in the principle which underlies all the mortgage cases. * * * *The lessee, as between the lessor and lessee, has become the principal for the payment of interest.* The intention and the object of the provision were, as in the mortgage cases, palpably and primarily for the benefit of the plaintiff, and to enhance its certainty of securing the interest upon the lessor's mortgage."

When there has been an assumption of the mortgage obligations, either by a vendee or a lessee, and the mortgagee sues to recover the debt, he ordinarily joins as defendants both the original mortgagor and the vendee or lessee who has assumed the mortgage obligations. The mortgagor may be vitally interested in having an adjudication that his vendee or lessee did assume the mortgage and that he, the mortgagor, is merely a surety on the obligation, but such a fact does not require a realignment of the mortgagor with the mortgagee. The mortgagee has a bona fide claim for relief against both defendants and it is wholly immaterial that one of them is liable only as surety.

So in the case at bar. The plaintiff has a bona fide claim for unpaid interest against Indianapolis Gas, Citizens Gas, and the City, and they are all properly aligned as defendants, even though some of them may be primarily and others only secondarily liable.

The City has never cited a single case in which the plaintiff had even one substantial controversy with a defendant and such defendant was realigned with the plaintiff for jurisdictional purposes. The fact that plaintiff and such defendant may be in accord as to some of the other issues in the case is wholly immaterial. To be sure, realignment is required where there is **no** bona fide prayer for relief against a particular defendant, as in *City of Dan-*

son v. Columbia Trust Co., 197 U. S. 178 (Pet. 12, 27), but that is not the situation in the case at bar. An analysis of *Sutton v. English*, 246 U. S. 199, the only other case on which the City relies (Pet. 28-9),* will show how completely it supports federal jurisdiction of this case. The facts were as follows:

Moses and Mary Jane Hubbard accumulated community property valued at about $100,000 and made a joint will establishing a charitable trust of this property on the death of Moses. After Moses' death the trustees secured a "pretended judgment" confirming the trust. Subsequently Mary Jane accumulated separate property of her own worth about $18,000 and died leaving all her property to a niece, Cora Spencer.

There were eight heirs at law of Mary Jane, of whom Cora was one. The other seven heirs (nonresidents of Texas) brought suit in a federal court in Texas, joining Cora Spencer and the trustees as defendants. All defendants were citizens of Texas. The objects of this suit, as stated by this Court, were (pp. 203-4):

(1) To annul the joint will setting up the trust.

(2) To set aside the judgment confirming the trust.

(3) To annul the will of Mary Jane in so far as it bequeathed the community property to Cora Spencer, but not to take the $18,000 from her.

(4) To partition the community property among plaintiffs and Cora Spencer.

Clearly, the interests of plaintiffs and Cora Spencer were identical as to issues (1), (2) and (4), since all the heirs would benefit by having the community property taken from the trustees and distributed among the heirs. Unless plaintiffs were successful as to issues (1) and (2),

* The City's prior petition for certiorari was based entirely on this case (Petition, No. 168, 1938, pp. 17-19).

in which Cora Spencer was interested with plaintiffs against the other defendants, the remaining issues would never become important, because they related solely to the distribution of the property to be recovered under issues (1) and (2). Thus, *the only controversy* between plaintiffs and Cora Spencer related to the *distribution* of the property which the plaintiffs sought to recover from the trustees. This Court held that this single divergence of interest prevented the realignment of Cora Spencer as a plaintiff. Thus *Sutton v. English* directly refutes the City's proposition that a defendant with whom plaintiff has a genuine controversy can nevertheless be aligned with the plaintiff.

The Court will notice the similarity between *Sutton v. English* and the case at bar. Here the interests of plaintiff and Indianapolis Gas are clearly adverse as to the disposition of the rent under the Lease. The Lease makes part of this rent payable to plaintiff or the Bondholders, as interest on the Bonds. In the contract of March 2, 1936, however, Indianapolis Gas is contending that *all* the rent should be paid to it. (I R. 206.) Plaintiff's judgment for the unpaid interest, against both Indianapolis Gas and the City, the present lessee, settles this matter in plaintiff's favor. Thus this case presents a conflict of interests substantially the same as the only conflict between the plaintiffs and Cora Spencer in *Sutton v. English*, i.e. as to how the fund shall be distributed once it has been recovered from the other defendants.

In direct contrast with the City's inability to cite a single case in which its theory was adopted and put into effect is the fact that the decision of this Court in *Sutton v. English* and the decisions of the Circuit Courts of Appeals are unanimous in holding that there will be no realignment if there is a single substantial controversy between the plaintiff and the defendant sought to be realigned.

Sutton v. English, 246 U. S. 199, 204 (1918);

Republic National Bank & Trust Co. v. Massachusetts Bonding and Insurance Co., 68 F. (2d) 445, 447 (C. C. A. 5th, 1934);

Detroit Tile & Mosaic Co. v. Mason Contractors' Association, 48 F. (2d) 729, 731 (C. C. A. 6th 1931);

Franz v. Franz, 15 F. (2d) 797, 799 (C. C. A. 8th, 1926);

Feidler v. Bartleson, 161 Fed. 30, 35 (C. C. A. 9th, 1908).

In each of these cases there was at least one controversy between the plaintiff and the defendant sought to be realigned, and this single controversy prevented such realignment, despite the fact that plaintiff and such defendant were in accord as to some of the other controversies. The rule of law applied in these cases and in the case at bar on the first appeal (II R. 291-2)—that a defendant against whom plaintiff asks relief and with whom plaintiff has distinct conflicts of interests cannot be realigned with the plaintiff in determining federal jurisdiction—has been universally recognized. The federal courts have continued to apply this rule since the decision of the jurisdictional question in this case in 1938. For example, see *Rea Co. v. International Harvester Co.*, 107 F. (2d) 767, 768 (C. C. A. 5th, 1939), in which the court cited *Sutton v. English* and the first decision of the Court of Appeals in the case at bar in support of its decision.

The City's contention that the question as to the validity of the Lease is the dominant controversy in this case and must govern the question of realignment, without regard to any other controversies, is based on the proposition that plaintiff and Indianapolis Gas are on the same side of that controversy (Pet. 28-9). The fact is however that plaintiff asks precisely the same relief against Indianapolis Gas on this issue that it asks against the City

and Citizens Gas, namely, that the Lease be held binding on each (Prayer 2, I R. 20-21). The fallacy in the City's argument is its assumption that a defendant can destroy the controversy upon which federal jurisdiction depends by admitting its liability, or even by consenting to have its liability enforced. The law is well settled to the contrary.

Re Metropolitan Railway Receivership, 208 U. S. 90 (1908).

In this case the Court sustained the jurisdiction of a federal court to appoint a receiver, against the contention that the court had no jurisdiction because (p. 107):

> "* * * the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers."

Thus, this Court said (pp. 107-8):

> "* * * Notwithstanding this objection, we think there was such a controversy between these parties as is contemplated by the statute. * * * Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the Circuit Court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt."

It is, therefore, wholly immaterial that Indianapolis Gas admits the validity of the Lease and is willing to have its binding effect established.

Plaintiff sought and obtained a substantial judgment against Indianapolis Gas, to say nothing of its other controversies with it, and the City has no support for its novel theory that a defendant against whom such a judgment has been obtained should be, or even could be, made a party plaintiff to this suit. Plaintiff has several direct controversies with Indianapolis Gas and that company was prop-

erly made a party defendant. As shown by the authorities reviewed above, even if plaintiff's interests were not adverse to those of Indianapolis Gas *as to one phase of this suit*, that would not warrant the realignment of Indianapolis Gas as a party plaintiff, so long as there is a single substantial controversy between it and the plaintiff.

II. THE CITY HAD AMPLE OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER THE ALLEGED BURDENSOMENESS OF THE LEASE WAS A VALID DEFENSE AND THE COURT OF APPEALS' DIRECTION TO ENTER FINAL JUDGMENT WITHOUT A RETRIAL OF THAT ISSUE WAS IN FULL ACCORD WITH DUE PROCESS OF LAW.

The Court of Appeals determined that a final judgment should be entered declaring the Lease valid and enforceable against the parties and awarding plaintiff judgment for the portion of the rent represented by the unpaid interest on the Bonds. The City contends (Pet. 13-14) that it has been denied due process of law because the Court of Appeals did not remand the case to the District Court to determine:

(1) The question of fact whether the Lease is burdensome; and

(2) The question of law whether such burdensomeness, if any, would be a valid defense.

This contention is based on the assertion that the District Court "reserved for future determination the question of the burdensome character of the lease," and that when the Court of Appeals directed a final judgment to be entered in plaintiff's favor it denied the City "a hearing in a trial court on the issue of the burdensome character of the lease" (Pet. 11). The absurdity of the City's contention is clearly demonstrated by a recital of what the record shows as to the reservation made by the District Court with respect to the issue of burdensomeness.

To facilitate the trial below several claims presented by plaintiff's Bill were excluded from the first trial, pursuant to Rule 42(b) of the new *Rules of Federal Procedure*. As to the claims *not* so excluded, the District Court entered an order* directing that evidence should be heard upon the issues whether the Lease is binding and enforceable and whether plaintiff is entitled to a judgment for interest on the Bonds against the defendants or the trust property—

> "with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property viz., that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis *had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome* and not advantageous to such trust: * * *." (II R. 321-2.)

The language just quoted is very similar to that in the proposed form of order presented to the District Court by counsel for the City, and the italicized language is precisely the same as that in the City's proposed order (IV R. 1320, Par. (3); IV R. 1330). Thus the only issue, so far as the validity of the Lease is concerned, upon which the taking of evidence was deferred was whether the City "had the right as such successor trustee *to refuse and reject an assignment of such lease* on the ground that such lease was burdensome." This is the "reserved" issue.

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* Under this order several claims on which Chase relied are still to be tried (e.g., failure to maintain the leased property, recovery of fees and expenses, etc.), but they do not affect the determination of the validity of the Lease.

While Chase did not object to this order (Pet. 11, 21, 25), it has consistently maintained that the allegations of burdensomeness presented no valid defense and that no evidence to support them should be received. (e.g. see IV R. 1331-2.)

stated in the City's own language, as to which the City complains it has not had its day in court (Pet. 11). This is a much narrower issue than that to which the City refers in its petitions (Pet. 10-11) and, as we shall see (*infra*, p. 93), the fact is that the City did not reject an assignment of the Lease, so that there was no occasion to determine whether it had the right to do so.

However, whether the questions as to burdensomeness were as broad as the City contends or as narrow as we contend, the City had ample opportunity to be heard both in the District Court and in the Circuit Court of Appeals on the broad question of law whether burdensomeness would be a valid defense.

(a) The City Had Ample Opportunity to be Heard in Both Lower Courts on the Question Whether Burdensomeness Would be a Valid Defense—Moreover the Hearing in the District Court Was Not Essential to Due Process of Law.

In the District Court plaintiff filed a motion to strike from the City's answer and counterclaim all the allegations asserting that the Lease was burdensome, thereby squarely raising the issue whether the alleged burdensomeness would be a valid defense if proved (II R. 317). This motion was denied (II R. 320). In its appeal plaintiff assigned as error the District Court's failure to strike out these immaterial allegations (Points 1 and 2, III R. 1196), and this question was fully argued in the briefs in the Court of Appeals. It is, therefore, clear that the City has in fact had its day in court on this question of law, both in the District Court and in the Court of Appeals. The Court of Appeals concluded, *as a matter of law*, that the City's allegations of "burdensomeness" presented no defense.

The City had ample opportunity *in both lower courts* to present its views as to the validity of the defense of

burdensomeness. Moreover, even if this question of law had not been considered by the *District Court*, the requirements of due process of law would have been fully satisfied. The City's proposition that "The City was entitled to a trial in the District Court on all questions of *fact and law*" (Pet. 13,* 14, emphasis is the City's) is clearly unfounded. The cases cited to support this proposition (Pet. 14, 23-5) hold that due process necessitates a judicial determination or review of *relevant* questions of fact as well as questions of law. None of them holds that there must be a determination of all questions of law and fact *by a trial court* and these cases are, therefore, not germane to the question here presented.

American Surety Co. v. Baldwin, 287 U. S. 156 (1932), completely refutes the City's proposition that due process of law requires a hearing of all questions of law and fact *in the trial court* and that a hearing of either type of question *in the reviewing court* only is not adequate. In that case the Surety Company sought relief from a judgment entered against it by an Idaho state court on a supersedeas bond. This bond was given on an appeal from a judgment against Singer Company and its employee, Anderson. After the bond had been given the state Supreme Court affirmed the judgment in plaintiff's favor against the defendant, Anderson, but reversed it as to the defendant, Singer Company. When the case came back to the trial court, that court entered judgment against the Surety Company, without notice to that company.

The Surety Company attacked the judgment against it on the ground that its bond had not stayed the judgment as to Anderson, that it was not subject to judg-

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* This statement appears in the two petitions as follows: Cause 421 at p. 13, Cause 422 at p. 14.

ment upon Anderson's failure to pay and that, since the judgment was entered without an opportunity for a hearing as to the construction and effect of its bond, the judgment was void under the due process clause of the Fourteenth Amendment. This Court held that there was no denial of due process, since the state procedure afforded the Surety Company opportunity to be fully heard on appeal. Thus, this Court said (p. 168):

> "* * * Due process requires that there be an opportunity to present every available defense; but *it need not be before the entry of judgment.* [citing cases] An appeal on the record which included the bond afforded an adequate opportunity. Thus, the entry of judgment was consistent with due process of law."

The rule announced in the above case—that an opportunity for a hearing on appeal, after judgment has been entered, fully satisfies the requirements of due process of law—is especially applicable to the case at bar. This case is a federal equity case and the Court of Appeals hears such a case *de novo*, with full power to adjudicate all questions of law and fact.

Alexander v. Redmond, 180 Fed. 92, 93, 96 (C. C. A. 2nd, 1910);
Lyon v. Union Gas & Oil Co., 281 Fed. 674, 67[illegible] (C. C. A. 6th, 1922);
Uukle v. Wills, 281 Fed. 29, 34 (C. C. A. 8th, 1922).

Thus it is apparent that the City had an opportunity to be heard in both lower courts on the question whether burdensomeness would be a valid defense. Beyond that, it is entirely clear that no constitutional right of the City would have been violated if the Court of Appeals had been the first court to pass on that question.

(b) The Decision of the Circuit Court of Appeals that the Alleged Burdensomeness Would Not be a Valid Defense is Obviously Correct.

The City does not complain that the decision of the Court of Appeals on the question of law as to the validity of the defense of burdensomeness is erroneous, but does complain that this question should have been referred to the District Court for rehearing there (Pet. 11, 13-14). Thus there is no issue in this Court as to the correctness of the decision by the Court of Appeals that the alleged burdensomeness is not a valid defense.

The City's statement (Pet. 11) that the Court of Appeals held "that if the lease were in fact burdensome Citizens Gas, as initial trustee, had no authority to execute the same, * * *" is not supported by the record. The Court of Appeals did say in passing (IV R. 1300) that the beneficiaries of a trust may set aside "a lease which is unreasonable under the circumstances." This was far from holding that the allegations of burdensomeness asserted by the City for the first time 22 years after the Lease was made could be a valid ground of defense to a Lease which was executed "with the full consent and approval of the City," after the Public Service Commission had determined that the Lease "was advisable and in the public interest." It is clear that the Court of Appeals actually held that Citizens Gas *did* have authority to make the Lease (IV R. 1300) and that the City's allegations of burdensomeness constituted no valid defense. Indeed, the City admits that the Court made the latter holding (Pet. 25).

The record discloses ample reasons why this decision by the Court of Appeals is sound.

1. The issue of burdensomeness is moot and wholly immaterial.

As we have seen (*supra*, p. 46), the only issue, so far as the validity of the Lease is concerned, upon which the taking of evidence was deferred was whether [illegible]

"had the right as such successor trustee *to refuse and reject an assignment of such lease* on the ground that such lease was burdensome." Actually, the City did not "refuse and reject an assignment of such lease." The Circuit Court of Appeals so held, and that holding is not challenged by the City's petitions for writs of certiorari.

The City affirmatively elected to take over the entire trust property, including the leasehold estate and its accompanying obligations (*infra*, pp. 98-107). In addition, the City accepted the assignment of the Lease and had it recorded and has been in possession of the leased property ever since (II R. 330, 350, 467-8; Stip. 6(c), II R. 622-3). Under such circumstances it is wholly immaterial whether the City had the right "to refuse and reject an assignment of such lease," since it not only did not exercise this supposed right, but affirmatively elected to take the trust property *in toto*, including the Lease.

2. The decision of the Indiana Public Service Commission forecloses the question of burdensomeness.

When the Lease was made in 1913 it was expressly approved by the Public Service Commission of Indiana as being in the public interest, after prolonged hearings and careful consideration of the objections made by Fishback, a beneficiary of the public charitable trust (see pp. 6-8, *supra*). The City was a party to the proceedings before the Commission and the Lease was made, as the City formally admitted in the *Cotter* case, "with the full consent and approval of the City of Indianapolis" (PX 89, III R. 569, offered, II R. 334, III R. 1057).

With reference to the Commission's approval of the Lease, the City says (Reply Br. 8):

> "Petitioners are cognizant of the rule that where the Commission has jurisdiction to decide questions of fact and enter an order thereon, and acts within its jurisdiction, *its decision is conclusive on the courts in a*

collateral action. But the order of the Commission approving the lease went no further, and could go no further, than *to determine upon the facts adduced, whether it was advisable and in the public interest* that the property of Indianapolis Gas be leased to Citizens Gas on the terms stated in the Commission's order."

Thus the City admits that this determination of the Public Service Commission—that the Lease "was advisable and in the public interest," and hence not burdensome to the trust of which the members of the general public were the beneficiaries—is conclusive on the courts in this collateral action. Moreover, it is the settled law of Indiana that such decisions of the Public Service Commission are conclusive on the courts in a collateral action.

Public Service Commission v. Indianapolis, 193 Ind. 37, 43; 137 N. E. 705, 707 (*infra*, pp. 90-1).

In the present case the City is demanding the right to make a collateral attack upon the Commission's decision that the Lease "was advisable and in the public interest."

3. The Williams case forecloses the question of burdensomeness.

In the *Williams* case (see pp. 14-16 above) Williams alleged that the Lease was part of a conspiracy "to destroy said Public Charitable Trust" (PX Stip. 35, Par. (20), II R. 777-8, Offered, II R. 328), that it was burdensome (II R. 780), and that it should be removed as "an unlawful cloud upon the title of said Public Charitable Trust" (II R. 790). The Supreme Court of Indiana held, among other things, that the Public Service Commission was authorized to approve the Lease and that the Lease would be valid and binding even if it were proved to be burdensome. *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212, 215-16 (1934).

This decision of the Indiana Supreme Court that the trust could not be relieved from the obligations of the Lease on the ground that those obligations were burdensome is

binding in the case at bar because it was (1) a conclusive adjudication between the parties to this case,* all of whom were parties to the *Williams* case, and (2) an authoritative statement of the law of Indiana.

The City complains that it was not heard in the trial court as to whether the decision in the *Williams* case is *res judicata* (Pet. 14, Par. (b)). As a matter of fact, it was fully heard on this question, both in the trial court and in the reviewing court. All the pleadings in the *Williams* case are in evidence (Stip. 14(g), II R. 632) and the record contains *all the available facts* as to the proceedings in that case. Also, the legal effect of that case was fully argued (e.g. see IV R. 1331, 1332-3), and indeed the City obtained a ruling by the District Court that the *Williams* case is not *res judicata* here (III R. 1178, No. 40; III R. 1190, No. 2).

4. Obligations incurred by contract or lease cannot be avoided on the ground that they are burdensome.

Under well settled rules of law, in the state of Indiana as elsewhere, neither a party to nor an assignee of a contract or lease can escape its obligations thereunder by showing that they were burdensome in the first instance or have become burdensome during the period of the contract or lease. This rule is peculiarly applicable to this case, where the Lease was made "with the full consent and approval of the City of Indianapolis."

Hamilton v. Hamilton, 162 Ind. 430; 70 N. E. 535, 537 (1904);

Warner v. Marshall, 166 Ind. 88; 75 N. E. 582, 592 (1905);

Indianapolis v. Indianapolis Gas-Light & Coke Co., 66 Ind. 396, 407 (1879);

Terre Haute v. Terre Haute Waterworks Co., 94 Ind. 305, 307 (1884).

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*The effect of the *Williams* case as *res judicata* is fully discussed at pages 75-90 below.

The City seeks comfort from the statement of the Court of Appeals that a trustee must act with prudence when making a long term lease and that otherwise the lease may be set aside at the suit of the beneficiaries (Pet. 22). Any such rights in the beneficiaries must, of course, be promptly asserted and are subject to the equities of the other parties to the lease, who are to be treated fairly under all the circumstances. The fact is that the beneficiaries of this particular trust have been fully heard with respect to the alleged burdensomeness of the Lease here in question, before the Public Service Commission before the Lease became effective and subsequently in the *Fishback* and the *Williams* cases. The City is in no position to make this collateral attack on these decisions by the Commission and the Indiana Supreme Court, particularly after receiving all the benefits of the Lease for a period of 22 years (1913 to 1935) without raising any question as to its validity (see pp. 129-32, *infra*).

We have already pointed out (*supra*, pp. 6-7) the opinions expressed by the officers and directors of Citizens Gas in 1913 and 1914 as to the extraordinary advantages accruing to that company and the community from the Indianapolis Gas Lease. *There has never been a suggestion throughout this case that the officers and directors of Citizens Gas were guided by anything but the highest motives in making the Lease here in question.* Their contemporaneous opinions, the authoritative determination of the Public Service Commission, and the decision in the *Williams* case should set at rest forever the bogy which counsel for the City attempt to raise in asserting that the Lease is burdensome.

(c) The Circuit Court of Appeals Having Correctly Determined That Burdensomeness Would Not Be A Valid Defense, Its Direction to Enter Final Judgment Was in Full Accord With Due Process of Law.

As we have already seen, the Court of Appeals concluded, *as a matter of law*, that the City's allegations of "burdensomeness" presented no defense. The City claims that its constitutional rights have been violated because it was not given an opportunity to prove these immaterial allegations. This claim is without substance. It is the universal practice for a court upon sustaining a demurrer, a motion to strike, or a similar attack upon a cause of action or defense, to refuse to allow a party to prove facts which would constitute no cause of action or defense if they were proved.

United States v. Metropolitan Body Co., 79 F. (2d) 177 (C. C. A. 2nd, 1935);
Sarasota County v. American Surety Co., 68 F. (2d) 543 (C. C. A. 5th, 1934).

This universal practice must be proper, for the right to prove facts which would constitute no defense if proved cannot be a requisite element of due process of law. The Court of Appeals having determined, *as a matter of law*, that the alleged burdensomeness would be no defense, there was no occasion for a further hearing on that question, or for the presentation of evidence in support of this ineffectual defense.

In the case now before this Court, the City has had its hearing on the issue of burdensomeness just as truly as a party has had his day in court when a demurrer to his pleading is sustained and a final judgment entered. The Court of Appeals having properly determined that this defense would be wholly ineffectual, there is no basis for the City's demand that the case be sent back to the trial court,

either to receive the evidence on this ineffectual defense or to secure a second expression of the views of the District Court as to the validity of this defense.

III. THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT CITIZENS GAS HAD THE POWER TO EXECUTE THE LEASE AND MAKE IT BINDING UPON THE PUBLIC CHARITABLE TRUST FOR THE FULL TERM OF THE LEASE.

The City asserts that Citizens Gas did not have authority to make the Lease. In this connection, however, the City admits (I R. 145-6):

> "* * * *said lease although conceded for the purpose of this litigation to be valid* for the period of said franchise contract and *until the property for which the Citizens Gas Company was Trustee was conveyed to the City of Indianapolis* as Trustee was *ultra vires*, invalid and void after the expiration of the term of the trusteeship of the Citizens Gas Company * * *."

Thus the City concedes the authority of Citizens Gas to make the Lease effective for the term of its own trusteeship, but contends that the Lease would have to terminate whenever Citizens Gas was replaced as trustee. The theory that a trustee's contract, admittedly valid when made, becomes a nullity when his successor takes his place as trustee is clearly unsound, and, as we shall now show, Citizens Gas had in fact ample authority to execute the Lease and make it binding upon the trust for its full term of 99 years.

(a) Citizens Gas Had Express Statutory Authority to Make the Lease For 99 Years.

The City's contention that the right of Citizens Gas to execute the Lease "was based solely on implied power" (Pet. 15) completely disregards the express statutory authority of Citizens Gas to make this Lease.

Prior to 1913 it was generally considered that the Indiana anti-trust laws forbade the consolidation of com-

peting utilities, either by lease or otherwise. Section 95½ of the Public Service Commission Law (Chapter 76, Acts of 1913*) was passed in 1913, for the obvious purpose of avoiding the prohibitory language of the anti-trust legislation. It read as follows:

> "Sec. 95½. That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and *any public utility may also*, with the consent of the holders of three-fourths of the capital stock outstanding, *purchase or lease the property, plant or business or any part thereof of any other such public utility* at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to nonconsenting stockholders the appraised value of their stock as fixed by the commission."

It is significant that this statute does not limit the period for which a lease may be taken. The statute provides for consolidations or mergers, whether by lease or otherwise, and authorizes the lease of a utility's entire assets upon a three-fourths vote of the stockholders. Obviously a merger effected by such a lease is not meant to be limited to a short period of time. As the court said in *Dickinson v. Consolidated Traction Co.*, 119 Fed. 871, 872 (C. C. A. 3rd, 1903), in sustaining the validity of a lease

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* The pertinent parts of Chapter 76 of the Acts of 1913 are set forth in "Appendix A" to this brief *infra*, p. 142.

of public utility property for a term of 999 years (p. 872):

> "* * * as corporation leases for 999 years were well known when, by the statutory provisions to which we have referred, *the power to lease was broadly and unqualifiedly given, we are not at liberty to assume that the exercise of that power was intended to be restricted to leases for a term not to exceed some limited, but wholly undefined and indeterminate, period.*"

Citizens Gas and Indianapolis Gas were, in the language of the statute, "furnishing a like service or product and doing business in the same municipality or locality," and therefore came within the express provisions of this statute. Citizens Gas was an Indiana public utility, as it was required to be by its Franchise from the City (I R. 82), and as such it had express statutory authority to enter into this Lease for a term of 99 years.

(b) The Franchise and Charter Powers of Citizens Gas Included the Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

The City contends that the right of Citizens Gas to execute the Lease was based solely on an "implied power" and that in the case of a grant made by a municipality "nothing is to be taken by implication against the public" (Pet. 15). The cases cited on the latter proposition (Pet. 15, 30) all deal with grants of rights to use public property, whereas the question at issue here is the nature and extent of the powers of Citizens Gas under its contract with the City.

This distinction was clearly pointed out in *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573 (1892). The plaintiff in that case sued the city to recover for gas supplied for lighting the streets. The plain-

tiff relied on an ordinance which granted it the right to use the streets to supply coal gas and which also contained an agreement by the city to purchase gas from the plaintiff for lighting its streets. The defendant city presented the same argument and relied upon the same Indiana case as the City of Indianapolis is relying upon in the case at bar. In response to that argument the Indiana Supreme Court said (pp. 575-6):

> "* * * *In addition to the grant above referred to, the ordinance embodies a contract between the city and the company* for the supply of gas. * * * The ordinance was in effect an offer by the city, the acceptance of which by the company created a contract between the parties, measured, like any other contract, by the terms and conditions of the writings. *We see no reason why the contract thus formed should not be construed and interpreted like any other written contract.*"

Similarly, in the case at bar the Franchise in question contained both a grant to use the City streets and a contract between the City and Citizens Gas. While *the grant* may be subject to the strict construction for which the City contends, *the contract* thus formed is to be "construed and interpreted like any other written contract."

As a matter of fact, neither the Franchise contract between the City and Citizens Gas nor its Articles conferred any specific authority to buy property, to hire employees, or to do any of the things necessarily incidental to carrying on its business, except as such powers were implied from the provisions of the Franchise and Articles stating that the company was to supply the City of Indianapolis and its inhabitants with gas for light, heat, and power. Thus Section 1 of the Franchise authorizes the use of the City streets to maintain, operate, and repair the pipes required "for the distribution and supply of gas to said city, and the inhabitants thereof, * * *." (I R. 82, lines 6 and 7). Similarly, Section III of the Articles provides:

> "The object of the promotion of this company shall be to supply the city of Indianapolis and its inhabitants with light, heat and power." (I R. 95.)

Beyond this, Section 17 of its Franchise required Citizens Gas "to so extend the various lines and mains of said plant that *all the inhabitants of said city* may be supplied with gas" (I R. 89).

Plainly, it is just as absurd to argue that Citizens Gas had no power to lease property because such power was not expressly conferred as it would be to argue that it had no power to acquire any property or hire any employees because no such powers were specifically conferred. The City's concession that the Lease was valid "until the property for which the Citizens Gas Company was Trustee was conveyed to the City" (I R. 145) necessarily involves the further concession that Citizens Gas had authority to take leases of property and that its powers were not limited to those specifically conferred by its Articles.

Clearly, Citizens Gas had all the power of any public utility to buy, lease, or construct the plant and system, or any part thereof, required to carry out its purposes, that is to furnish artificial gas to the City and *all* its inhabitants. Although Citizens Gas started out by purchasing the property of the Consumers' Gas Trust, there was no requirement in the Franchise or otherwise that it should acquire that particular property. Following that acquisition it purchased other property and mortgaged its plant from time to time in order to secure additional property or to extend its facilities or expand its plant (*infra*, p. 65). There is no reason why it was not as much within its power to lease the plant of Indianapolis Gas as it was to purchase the plant of the Consumers' Gas Trust.

In determining the extent of the charter powers of Citizens Gas, we are confronted with the question: *What is the charter of an Indiana corporation?* We find a most

illuminating answer to this question by the Supreme Court of Indiana in *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406 (1911). In that case the Stone Company brought suit to condemn a right-of-way for a lateral railroad over the lands of the defendant. The defendant insisted that it would be *ultra vires* for the Stone Company to build and operate a railroad. The Stone Company was organized under the Indiana laws governing the incorporation of manufacturing and mining companies, as was Citizens Gas, and claimed the right to condemn the defendant's property under the provisions of the *general statutes* of Indiana authorizing the construction of lateral railroads and granting the power of eminent domain. It is important to observe that the authority upon which the Stone Company relied was not contained in the statutes providing for the incorporation of manufacturing and mining companies, but *in the general laws dealing with lateral railroads*. In disposing of the defendant's contention, the court said (p. 410):

> "It is next contended by appellee that, if appellant actually constructed said road and sought to exercise the powers of a common carrier, such acts would be *ultra vires*, since by its articles of incorporation it is organized only for the purpose of mining, quarrying, producing, manufacturing, and dealing in stone. It may be admitted that such are the powers of the corporation as shown by its articles of incorporation, and that a corporation can exercise no powers nor engage in any business not authorized by its charter. But *it is well settled that the charter of a corporation formed under a general law consists of its articles of incorporation and the laws governing such corporation. Bent. Rec., v. Underdown*, 156 Ind. 516, 519, 60 N. E. 307; *State v. Anderson*, 31 Ind. App. 34, 42, 67 N. E. 207; 1 *Cook on Corporations*, (6th Ed.) § 2; 1 *Thompson on Corporations* (2d Ed.) § 172. This being true sections 5398 *et seq.*, Burns 1908, *enter into and become a part of appellant's charter* and

confer upon it the right to construct and operate said railroad. Any other construction would nullify the effect of said statute."

Thus, the Supreme Court of Indiana held that the general statutes of Indiana, providing for the construction and operation of lateral railroads, became part of the charter of the Stone Company, although there was no authority to build or operate railroads contained in its articles and it is doubtful whether such authority could have been implied from its general purposes.

It is also well settled law in Indiana that the state legislature has the reserved power to add to or change the powers of Indiana corporations previously incorporated, and that it can make such changes by a general statute, without changing the corporation's articles of association themselves.

Denny v. Brady, 201 Ind. 59, 163 N. E. 489 at 490 (1928).

The Franchise provided that it should be assigned to an Indiana corporation and be carried out by that corporation (§ 1, I R. 82). Consequently it must have been contemplated that the corporation to be formed would have powers as extensive as those which were then or should thereafter be conferred upon public utility corporations of Indiana. Under the rule stated in *Westport Stone Co. v. Thomas* and in *Denny v. Brady*, § 95½ of the *Public Service Commission Law* became part of the charter of Citizens Gas as soon as it was enacted, and thereafter its charter powers included the *express authority* to enter into the Lease for its full term of 99 years.

(1) The possibility that the City would succeed Citizens Gas as trustee did not limit the right of Citizens Gas to make the Lease binding on the trust for the full term of the Lease.

The City concedes that the Lease in question was valid during the trusteeship of Citizens Gas (I R. 145). The mere change of trustees in 1935 did not make voidable the Lease recognized to be valid during the preceding 22 years. In other words, the possibility that the City would succeed Citizens Gas as trustee did not limit the authority of Citizens Gas to execute the Lease and bind the trust thereto for the full term of the Lease.

In this connection it is vital to remember that the term of the trusteeship of Citizens Gas was of very uncertain duration, although the trust itself was to be perpetual. The City was entitled to succeed Citizens Gas as trustee whenever the Citizens Gas certificate holders had received the face amount of their certificates and a 10% per annum return thereon in any one of five different ways: (1) payment by Citizens Gas itself (I R. 84, Par. (g)); (2) payment with the proceeds of a mortgage on the Citizens Gas property, after August 30, 1930 and upon demand by the City (I R. 84, Par. (i)); (3) payment by the City, after August 30, 1930 (I R. 93, § 22); (4) payment by the City, in case of the insolvency of Citizens Gas (I R. 93, § 23); and (5) by mortgage or by payment by the City, in the event Citizens Gas charged more than a stipulated rate for gas (I R. 88, § 14).

Obviously, none of these events was certain to occur. With the exception of event (1), all of them depended upon the City's exercise of its rights, and this was an uncertain matter because the exercise of those rights involved the raising of funds and the assumption of substantial obligations. Event (1) was particularly uncertain because it depended upon Citizens Gas earning enough to pay a 10% per annum return on its stock and also to

retire all its stock. This might take place within a few years or it might never occur.

There was, therefore, no assurance that the City would ever succeed Citizens Gas as trustee. Citizens Gas necessarily proceeded on the assumption that it might be in business indefinitely and that it should do everything any other public utility would do to increase its capacity to serve the public and earn an adequate return for its certificate holders. On the other hand, there was no assurance that Citizens Gas would remain as trustee for any definite period, and its term of office might soon come to an end.

The powers conferred by the Franchise and Articles must be interpreted in the light of the indefinite term of the trusteeship of Citizens Gas. No one would deal with Citizens Gas if his contract with Citizens Gas were subject to an early end upon the termination of the trusteeship of Citizens Gas at an unknown date in the future. Citizens Gas could not, however, remain idle and wait for its successor to take action, for it could not tell when, if ever, the City would succeed to its position as trustee. Hence Citizens Gas necessarily had to have power to make contracts which would bind the trust in the hands of the successor trustee.

It is clear under the authorities that a trustee has power to make a contract or lease which may extend beyond his term of office and that the obligations so created will bind his successor in office.

City of Richmond v. Davis, 103 Ind. 449, 3 N. E. 130 (1885);

Greason v. Keteltas, 17 N. Y. 491, 494-5, 497 (1858).

This general rule that trustees have power to enter into agreements binding upon their successors in office is especially applicable here in view of the nature of the trust property, the perpetual duration of the trust, and the indef-

inite term of office of the initial trustee. It was clearly contemplated that Citizens Gas would enter into obligations which would carry over into the period of the City's trusteeship, and that when the City took over the trust property it would have to do so subject to all such obligations. Thus both the Franchise and the Articles provided that in certain events Citizens Gas should mortgage its property to pay off its certificate holders and should then convey its plant to the City "subject to such obligations *and other legal obligations against said company*" (I R. 85, 93, 99).

As a matter of fact, one of the first things Citizens Gas did was to acquire outright title to the property of another gas company. This necessarily involved the assumption of burdens such as taxes, insurance, maintenance, etc., which would continue indefinitely, unless Citizens Gas or the City disposed of the property. In 1912, in order to expand its business, Citizens Gas gave a mortgage upon its property which was not to mature until 1942, and from time to time additional bonds were issued under that mortgage (Stip. 16 (b), II R. 634; PX Dep. 10, II R. 607, Offered II R. 420, 564). Beyond that, from time to time Citizens Gas issued additional stock, either common or preferred, in order to extend its business or for other similar corporate purposes (PX Dep. 7, II R. 599, Offered II R. 420, 561); PX 90, III R. 879, Offered, II R. 356). Later on Citizens Gas entered into a lease for office space in the Majestic Building. This lease was still in force when the City took over the trust property, and yet the City took all of the Citizens Gas property, including the assignment of the Majestic Building lease (PX Stip. 56, III R. 835, Offered, II R. 327), thus recognizing the right of Citizens Gas to impose burdens of this character upon the trust estate.

If, in 1913, Citizens Gas had bought the Indianapolis Gas property outright and either given a purchase money mortgage or mortgaged all of its property, or had issued

additional stock to pay the purchase price, the City would apparently admit the validity of such a transaction and would pay the mortgage bonds or the stock, as it has paid off the bonds and stock of Citizens Gas. As a matter of fact, it was a far more advantageous arrangement from the public point of view and from the point of view of the Citizens Gas stockholders to make the Lease in question than it would have been to issue Citizens Gas stock in a sufficient amount to pay for the Indianapolis Gas property. The major part of the investment in the Indianapolis Gas property (the Bonds) has received a return of only 5% during the period since 1913, and the maximum return (on the stock) has been 6%, whereas the issuance of Citizens Gas stock for the purpose of buying the property outright would have required an annual dividend rate of 10%, in accordance with the terms of its Articles and Franchise. Since there is no dispute as to the right of Citizens Gas to acquire the title in fee to real estate or the absolute title to other property, all of which entails the assumption of burdens and obligations which may extend beyond the actual trusteeship of Citizens Gas, it must be clear that Citizens Gas also had authority, subject to the approval of the Public Service Commission, to enter into leases which might extend beyond the term of its trusteeship.

(c) The Express Statutory Power of Citizens Gas to Effect a Merger by Making the Lease For 99 Years Overrode the Limitations, If Any, Arising From the Public Charitable Trust.

Citizens Gas had ample authority under its Articles and its Franchise to make the Lease, but even if we assume that the public charitable trust involved some limitation of the authority of Citizens Gas in this respect, its power as a public utility to effect a merger by making such a Lease (conferred by §95½ of the Public Service Commission Law

of 1913, *supra*, p. 57) would override any such limitation.

The power of the state of Indiana over Citizens Gas as a public utility transcended the rights of the beneficiaries of the public charitable trust. This principle was conclusively established by the *Williams* case. The plaintiff in that case challenged the validity of the act of Citizens Gas in surrendering its Franchise and accepting an indeterminate permit from the state. This attack was unsuccessful. The Supreme Court of Indiana pointed out that the action taken by Citizens Gas was authorized by the Public Service Commission Law (§§ 100, 101, quoted in Appendix A, pp. 145-6 below). The court then said (188 N. E. 215):

> "* * * Granting the existence of a trust relationship between the Citizens' Gas Company and a class of persons of which appellant is representative, *that relationship cannot qualify the power of control of the state over the Citizens' Gas Company as a public utility*; nor can it limit the power of the Citizens' Gas Company to voluntarily relinquish any contractual or franchise privilege which a public utility may relinquish under the law; nor can any beneficial interest of appellant and members of his class in the property or business of the Citizens' Gas Company preclude the state from exercising all control over the affairs of the Citizens' Gas Company which the state has the power to exercise by reason of the fact that the Citizens' Gas Company is a public utility. In short, *the class of beneficiaries of which appellant is a member hold whatever interest they may have in the Citizens' Gas Company subject to the power of the state to control the Citizens' Gas Company as a public utility.*"

The rights of the City as trustee of this public charitable trust can rise no higher than the rights of the beneficiaries whom it represents. When the Indiana Supreme Court held that the rights of those beneficiaries were "subject to the power of the state to control the Citizens' Gas

Company as a public utility," it necessarily held that this power was predominant over the rights of the City.

This principle established in the *Williams* case is, of course, binding upon the federal courts, and, as a matter of fact, the federal courts have approved and followed it. For example, *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855 (see pp. 13-14 above) presented the issue whether the surrender of the Citizens Gas Franchise completely terminated the public charitable trust. On that subject the Court of Appeals said (p. 868):

> "We are not dealing with the question of the power which the state might have exercised with respect to vested property rights created in the public interest as an inducement to the grant, if it had seen fit to do so. *The supreme authority of the state over both proprietary and governmental functions of its agency, the municipality, is not to be gainsaid.*"

We are now dealing with the power which the state has in fact exercised by authorizing the making of the Lease. The supreme authority of the state of Indiana over the activities of Citizens Gas and the City in conducting the business of a public utility "is not to be gainsaid."

Section 95½ of the Public Service Commission Law (quoted above, p. 57) was a grant of authority from the state authorizing competing utilities to merge or make leases, but a competing utility could be leased only "at a price and on terms fixed by the commission." Thus the Commission was clothed by the state with power to determine when, at what price, and upon what terms public utilities could merge or make long term leases. As the court said in the *Williams* case, speaking of the Lease here in question (188 N. E. 216):

> "* * * Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it."

Hence the Commission's approval of the Lease was, in the language of the *Williams* case, an exercise of "the power of the state to control the Citizens' Gas Company as a public utility." This exercise of the state's supreme power gave Citizens Gas authority to execute the Lease, without regard to any limitations (in fact there were none) arising from the public charitable trust.

(d) The Williams Case Conclusively Determined That Citizens Gas Had Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

After all, the question whether Citizens Gas had power to execute the Lease and make it binding on the public charitable trust for the full term of the Lease was conclusively determined in the *Williams* case (see pp. 14-16 above) and is no longer open to discussion. In his complaint Williams alleged that the Lease (II R. 790):

> "* * * was *ultra vires* said Citizens Gas Company, its officers and representatives, and is unlawful and should be determined and adjudged in this suit to be, and to have been *ab initio*, void and said pretended lease should herein be determined and adjudged to constitute an unlawful cloud upon the title of said Public Charitable Trust and should be removed by the proper decree of this court in this suit."

The Indiana Supreme Court sustained the validity of the Lease and refused to remove this alleged "unlawful cloud upon the title of said Public Charitable Trust." Thus, the court said (188 N. E. 215-16):

> "[7, 8] In respect to the alleged invalidity of the lease executed between the Citizens' Gas Company and the Indianapolis Gas Company, it appears from the complaint that *the lease was one which the Citizens' Gas Company and Indianapolis Gas Company had the power to execute* and one which would result in great advantage to the Citizens' Gas Company,

> * * * Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it. *The complaint does not make out a case for any relief on the basis of invalidity of the lease* or of the action of the commission in approving the same."

Even if this decision were not binding on all parties to this litigation as *res judicata* (as we shall see, p. 75 below, there can be no doubt that this decision is *res judicata*), this decision is an authoritative statement of the law of Indiana and is a binding precedent in all federal courts.

(e) The Practical Construction of the Franchise and Articles by the City and Citizens Gas Shows That Those Instruments Gave Citizens Gas Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

We have seen that the City was duly represented in the proceedings before the Public Service Commission at which the Lease was approved, that the Lease was executed "with the full consent and approval of the City," and that in the *Fishback* case the City formally denied all of Fishback's allegations attacking the validity of the Lease, which denial was maintained from 1913 to 1921, when the case was finally disposed of and the City dismissed as a party defendant (*supra*, pp. 8-10, 13). Likewise, both the City and Citizens Gas resisted the attack on the Lease in the *Williams* case (*supra*, p. 14). As late as June 2, 1931, *after* (Stip. 13(j), II R. 630) the *Todd* case had established the City's right to have Citizens Gas comply with its demand for a transfer of all the trust property (*supra*, pp. 12-14), the City, Citizens Gas, and others joined in a motion to strike large portions of Williams' complaint (Stip. 14(b), II R. 631; PX Stip. 37, II R. 804, Offered, II R. 328). This motion asserted (II R. 807):

> "Third. It appearing that *the lease so approved by the Public Service Commission has been in full force and effect for nearly 17 years* and that many millions of dollars have been expended in reliance upon its validity, *all persons including plaintiffs* (if they have any standing under any circumstances) *are estopped to question the validity of the same.*"

Concerning the allegations that the Lease was part of a conspiracy to destroy the trust, the motion said (II R. 808):

> "Second. The lease of the property of the Indianapolis Gas Company to the Citizens Gas Company *having been validly made*, the actions of any individuals leading up to such lease are wholly immaterial."

We have discussed elsewhere (*supra*, pp. 10-11, 16-20; *infra*, pp. 104-6, 120-9) the sale of the City's Revenue Bonds in 1935 and some of the other acts and representations which estop both the City and Citizens Gas from denying that the Lease is valid and enforceable for its full term. Thus, during a period of over 22 years (May, 1913 to July, 1935) both Citizens Gas and the City insisted, before the Public Service Commission, in the *Fishback* case, in the *Williams* case, and in many other ways, that the Lease was a valid and binding Lease for 99 years. This conduct constitutes *a practical construction* of the Franchise and Articles of Citizens Gas and the related documents having to do with the public charitable trust. The parties to the trust instruments have themselves, for a period of more than 22 years, interpreted those instruments as conferring authority on Citizens Gas to execute the Lease and make it binding for its full term.

The familiar rule that the practical construction of a contract by the parties thereto is of great, if not controlling, importance in ascertaining the proper interpretation of the contract is well established in the State of

Indiana. Thus, in *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573 (1892), *supra*, page 58, the Indiana Supreme Court said (p. 576):

> "* * * That it is the duty of a court, where the language of a contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put upon the contract, and to enforce that construction, has been so often asserted by this and other courts that no doubt of its soundness can be entertained."

See also:

Board of Commissioners v. Gibson, 158 Ind. 471, 63 N. E. 982, 987 (1902);

Roush v. Roush, 154 Ind. 562, 55 N. E. 1017, 1019 (1900);

Vandalia R. R. Co. v. Terre Haute Vitrified Brick Co., 183 Ind. 551, 108 N. E. 953, 955 (1915).

The statement of the Indiana Supreme Court in the *City of Vincennes* case, quoted above, is directly applicable here. The Franchise contract between the City and Citizens Gas is "indefinite" as to the powers of Citizens Gas. It is, therefore, the duty of the court "to adopt the construction and practical interpretation which the parties themselves have put upon the contract, and to enforce that construction."

This well established rule that the practical construction of an instrument by the parties thereto has great, if not controlling, influence is so familiar as to require no further discussion. This rule is, of course, applicable to various kinds of written instruments and, in particular, to trust instruments.

Lowrey v. Hawaii, 206 U. S. 206, 222 (1907);

In re Sandford's Estate, 277 N. Y. 323; 14 N. E. (2d) 374, 376 (1938);

Wallace v. Wallace, 168 Va. 216; 190 S. E. 293, 296 (1937);

In re Leupp, 108 N. J. Eq. 49; 153 Atl. 842, 845 (1931).

In *Lowrey v. Hawaii*, just cited, this Court said (pp. 222-3):

"* * * In *Brooklyn Life Insurance Co. v. Dutcher*, 95 U. S. 269, it was said: '*There is no surer way to find out what parties meant than to see what they have done.*' So obvious and potent a principle hardly needs the repetition it has received.

"* * * We hence see that not only the immediate practice of the government construed the agreement as contended for by appellants, but the practice of over fifty years proclaimed the same meaning—proclaimed it without question and against a suggestion and agitation to reject it. *It is somewhat staggering to be told that such continuity of practice is not a legal interpreter of the meaning of the parties and that the only criterion can be a precise and isolated form of words* which, at the end of half a century of contrary admission and declaration, one of the parties finds it convenient to bring forward.

"*It is no defense that the government's policy has changed. It cannot so release itself from its engagements.*"

This Court's quotation from the *Brooklyn Life Insurance Company* case, "There is no surer way to find out what parties meant than to see what they have done," is peculiarly applicable here. Certainly there is no surer way of ascertaining what the parties meant in the instruments having to do with the public charitable trust than to see what they did under those instruments. Their practices for a period of 22 years proclaimed that Citizens Gas had authority to enter into this 99-year Lease. When this authority was challenged by Fishback and later by Williams, both Citizens Gas and the City proclaimed this inter-

pretation of the trust instruments—"proclaimed it without question and against a suggestion and agitation to reject it." The City's policy changed in the summer of 1935, but: "It is no defense that the government's policy has changed. It cannot so release itself from its engagements."

The significance of the uniform interpretation of the trust instruments as conferring power upon Citizens Gas to enter into the Lease is perhaps best revealed by paraphrasing this Court's rebuke of the government in the above case:

> It is somewhat staggering to be told that such continuity of practice for a period of 22 years is not a legal interpreter of the meaning of the parties and that the only criterion can be whether the trust instruments conferred specific power to execute the Lease, a test which, at the end of 22 years of contrary admission and declaration, the City now finds it convenient to bring forward.

Citizens Gas had express statutory and charter power to enter into the Lease for its full term and this fact is borne out by the practical interpretation of the Articles and Franchise by Citizens Gas and the City for a period of 22 years.

IV. THE VALIDITY OF THE LEASE AND ITS BINDING EFFECT ON THE PUBLIC CHARITABLE TRUST HAVE BEEN CONCLUSIVELY ESTABLISHED BY THE JUDGMENT IN THE WILLIAMS CASE AND OTHER DECISIONS.

The decision by the Circuit Court of Appeals was based primarily on its own independent conclusion that the Lease is valid and binding. This decision is fully supported by the law and facts, without resorting to any prior adjudications. It is not clear whether the Court of Appeals relied on any prior decisions as being *res judicata*, as distinguished from being controlling statements of Indiana law.

but it is clear that the Court of Appeals would have been justified in holding that the validity and binding effect of the Lease on the public charitable trust had been conclusively established by the *Williams* case and other decisions. As the Court of Appeals said (IV R. 1300): "No amount of verbal magic resorted to by counsel for the City will avail to brush aside the barrier these cases present to him."

(a) The Judgment in the Williams Case Conclusively Determined that the Lease is Binding on the Public Charitable Trust, on Citizens Gas as Initial Trustee, and on the City as Successor Trustee.

We have already pointed out that all the parties to the case at bar were also parties to the *Williams* case and that the complaint in that case quoted in full the Franchise and Articles of Citizens Gas and its Lease from Indianapolis Gas (*supra*, pp. 14-16). In that case Williams sued as a beneficiary of the public charitable trust, in behalf of the trust, and the original trustee (Citizens Gas) and the successor trustee (the City) were parties defendant (*infra*, pp. 84-5). As we have already shown (*supra*, pp. 15-16), this attack on the Lease was unsuccessful and the Indiana Supreme Court held that the trust could not be relieved from this alleged "unlawful cloud" on its title. Thus the court conclusively determined that the Lease is binding on the public charitable trust, on Citizens Gas as initial trustee, on the City as successor trustee and on the trust property, and this determination is *res judicata* as to all parties to this litigation.

None of the arguments by which the City seeks to avoid the decision in the *Williams* case is sound. We shall discuss those arguments briefly.

1. The City has raised no issues as to the binding effect of the Lease on the trust which were not adjudicated in the Williams case.

In its attempt to escape from the decision in the *Williams* case the City asserts: "The issues in the *Williams* case were essentially different from the issues in this case" (Reply Br. 9). As a matter of fact, the City is attacking the binding effect of the Lease on the public charitable trust on the very same grounds as those relied on by Williams.

The only alleged new issues in this case to which the City refers are "The enforceability of the lease against the City and the right of the initial trustee (Citizens Gas) to bind the City to the terms of the lease" (Reply Br. 9). However, the fact is that these issues were squarely presented by Williams in his complaint.

Williams challenged "the right of the initial trustee (Citizens Gas) to bind the City to the terms of the lease." This right was challenged by allegations such as the following (II R. 780-1):

> "* * * that said pretended lease of October 1, 1913, * * * impairs the charter of said Citizens Gas Company and *it impairs, also, the said contract* of August 25, 1905, by and between the City of Indianapolis by and through its Board of Public Works, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, * * * *wherein and whereby said Public Charitable Trust was created;*"

and allegations such as (II R. 790):

> "That the said pretended agreement of lease * * * *was ultra vires said Citizens Gas Company*, its officers and representatives, and is unlawful and should be determined and adjudged in this suit to be, and to have been *ab initio*, void *and said pretended lease should herein be determined and adjudged to constitute an unlawful cloud upon the title of said Public Charitable Trust* and should be removed by the proper decree of this court in this suit."

Williams attacked "the enforceability of the lease against the City" by his assertions *that the City was then entitled to receive the trust property*, free and clear from any obligations under the Lease. Thus, he alleged that (II R. 771):

> "* * * said trust is **now** entitled to have made the formal and final transfer, accordingly, of all the property and franchises of said Citizens Gas Company to said Municipal City of Indianapolis as the active trustee of said Public Charitable Trust for the use and benefit of the inhabitants and taxpayers of said city, among whom are these plaintiffs."

It should be noted here that when Williams filed his suit (March, 1930; Stip. 14(a), II R. 630) the City had already demanded the transfer of all the trust property (*supra*, p. 12). Also, Citizens Gas had expressly recognized the trust and had indicated its willingness to comply with the City's demand (PX Stip. 23, II R. 672, Offered, II R. 327), but the suit by Todd had prevented it from doing so (Stip. 13(a), II R. 628). Moreover, by the time the *Williams* case was heard the *Todd* case had been decided and the right of the City to take over the trust property had been established. (Stip. 13(j), 14(h), II R. 630, 632).

Williams contended, not only that the City was then entitled to receive the trust property, but also that the Lease would not be enforceable against the City after it had succeeded Citizens Gas as trustee. In this connection he alleged that the Lease and the other acts complained of constituted (II R. 772):

> "* * * *an unlawful cloud upon the title of said Municipal City, as trustee*, * * *."

Williams also contended that a receiver should be appointed for Citizens Gas who should (II R. 795):

> "* * * pay all determined debts and thereupon *deliver said Citizens Gas Company, clear and free from any obligation whatsoever*, through the administrative agency

> of this court in this suit, *to said City of Indianapolis as trustee of said Public Charitable Trust,* * * *."

In another connection the City asserts that "the question of the burdensomeness of the lease to the City was not in issue" in the *Williams* case (Reply Br., 10). Here, too, is a supposed new issue in the case at bar which was in fact fully presented in the *Williams* case. Williams' allegations as to the supposed burdensomeness of the Lease were fully as vigorous and far-reaching as any such allegations by the City in the case now before this Court. In Section (20) of his complaint (II R. 777-8) he alleged that a conspiracy had been formed "to *destroy* said Public Charitable Trust" and that the conspirators had accomplished certain things to their advantage which would be described in the succeeding sections of the complaint. He then described the making of the Lease as one of the accomplishments of the conspirators (II R. 779-80). He also tabulated the sums paid by Citizens Gas under the Lease and asserted (II R. 780):

> "That said payments with interest thereon in their aggregate *are more than ten times the entire value of all the property of said Indianapolis Gas Company* * * *."

It clearly appears that Williams was relying on the alleged burdensomeness of the Lease *to the City* as successor trustee. The theory advanced throughout the entire complaint was that Citizens Gas was through and that the City was then entitled to receive the trust property, without the alleged burdens of the Lease. As we have already noted, Williams contended that the Lease and the other acts described in his complaint constituted "*an unlawful cloud upon the title of said Municipal City, as trustee*," and that the object of the suit was to remove such "unlawful cloud" (II R. 772).

It is, therefore, clear that "the question of the burdensomeness of the lease to the City," "the enforceability of

the lease against the City" and "the right of the initial trustee (Citizens Gas) to bind the City to the terms of the lease" (Reply Br., 10) were in fact all put in issue in the *Williams* case. When the Indiana Supreme Court refused to remove this "unlawful cloud upon the title of said Municipal City, as trustee," that court conclusively determined these various questions adversely to the City's *present* contentions.

2. The judgment in the Williams case would be conclusive even if the City were relying on new grounds of attack.

We have just shown that the City has raised no issues as to the binding effect of the Lease upon it as successor trustee which were not adjudicated in the *Williams* case. Furthermore, even if the City were now attacking the Lease on different grounds than those presented in the *Williams* case, that fact would have no legal significance. Williams attacked the Lease in behalf of the public charitable trust and it was incumbent upon him, or upon the defendants who were present in the interests of the trust (both Citizens Gas and the City) to present in that case all the grounds for the alleged invalidity of the Lease. If the City thought that Williams was not making an effective attack on the Lease and was omitting proper grounds of attack which should have been urged upon the court, it had the opportunity to join in the attack and present any additional grounds it wished to present. This opportunity was, however, limited solely to the *Williams* case. The validity of the Lease was presented for determination and under well-settled rules of law that question had to be determined once and for all in that case. As a matter of fact, the City contended that the Lease was valid and binding and resisted Williams' attacks on its validity (*supra*, p. 15; *infra*, pp. 104, 119).

Under well-established rules of law, the defendants are precluded from asserting in this case any grounds for

the alleged invalidity of the Lease which they might have asserted in the *Williams* case. For example, in *Werlein v. New Orleans*, 177 U. S. 390 (1900), the City of New Orleans sued to recover land which had been taken from it on execution. The defendant claimed through the purchaser at the execution sale and relied upon the adjudication in an earlier case in which the city had attempted to enjoin the execution sale. The city relied upon the fact that the property in question had been dedicated to public use as a public square and that this fact had not been relied upon in the earlier action. This Court admitted that *the defense tendered by the city would be a valid one if there had been no prior adjudication*, but held that the prior judgment was binding on the city.

In disposing of the contention that the city was presenting new facts or new grounds bearing upon the invalidity of the execution sale, this Court, speaking through Mr. Justice Peckham, said (p. 399):

> "The fact now alleged would have furnished in the chancery suit but another ground or reason upon which to base the claim of the city, that Klein had no right to sell the property under his writ. * * * and we think *it was the duty of the city to set up in that suit and to prove any and all grounds that it had to support the allegation that Klein had no right to seize or sell the property.*"

See also to the same effect:

> *United States v. California and Oregon Land Co.*, 192 U. S. 355, 358 (1904);
>
> *Northern Pacific Railway Co. v. Slaght*, 205 U. S. 122, 130-3 (1907).

The law in Indiana is in complete accord with these decisions by the United States Supreme Court.

Elwood v. Bogmer, 100 Ind. 504 (1884), was an action for partition in which the appellant, Vashti Elwood, by

cross complaint claimed complete title to the property adversely to the other parties to the suit. The other parties alleged that one David Elwood had previously brought suit for partition of land which included the land in controversy, and that it was there decreed that David Elwood and the appellant each owned only a one-third interest in the land. (David's one-third interest was set off to him in the prior suit and he was not a party to the second suit.) The appellant urged that the prior suit was not *res judicata because all the parties to the second suit had been defendants* in the suit by David Elwood. The Indiana Supreme Court replied that it was incumbent upon the appellant to present her contentions by cross complaint in the first suit and ruled that the claims presented by her in the case then before it had been conclusively determined against her in the prior suit. Thus, the Court said (p. 509):

> "* * * Sixty years ago, in *Fischli v. Fischli*, 1 Blackf. 360, this court said: 'Whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is the principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. *This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case.*' The doctrine of the case cited, upon the point now under consideration, is the recognized law of this State, and has been approved and followed, without doubt or question, in many of the more recent decisions of this court."

See also *Griffin v. Hodshire*, 119 Ind. 235, 21 N. E. 741, 743 (1889), and *Cannon v. Castleman*, 162 Ind. 6, 69 N. E. 455, 456 (1904).

Even if it should appear (*as it does not*) that the City relies on different grounds of attack on the validity of the Lease than were presented in the *Williams* case, such circumstance would have no legal significance.

3. The mere transfer of the trust property did not affect the conclusiveness of the decision in the Williams case.

The City's second proposition as to the binding effect of the *Williams* case is that "The Transfer to the City of the trust *res* on September 9, 1935, creates a situation which so alters the rights of the parties as to prevent a successful assertion of *res adjudicata*." (Reply Br. 10.) This argument ignores the well established principle that a transferee of property is bound by any judgment which affected the property in the hands of his transferor.

> *Skelton v. Sharp*, 161 Ind. 383; 67 N. E. 535, 536 (1903);
>
> *Long v. Schowe*, 181 Ind. 13; 103 N. E. 785, 787 (1914).

Also, as we have already pointed out (*supra*, pp. 76-9), the question of the enforceability of the Lease *against the public charitable trust* was put in issue in the *Williams* case, and the binding effect of the Lease on the trust was established by the decision in that case. The necessary effect of that decision—that the Lease is a binding obligation of the trust—is that the Lease is binding on the trust property, whoever is trustee. Obviously, the judgment against Citizens Gas in the *Williams* case would be binding upon the City, as transferee of Citizens Gas and successor trustee, even if the City had not been a party to that case. The fact is, moreover, that the City was expressly made a party to the *Williams* case in its capacity as successor trustee of the public charitable trust (*infra*, p. 85).

The fact that the City had not yet become successor trustee at the time of the *Williams* case is wholly immaterial. That fact could not prevent the court from adjudging the Lease to be a binding obligation of the trust and the trust could not thereafter avoid that obligation merely by changing the trustee. Furthermore, when the

Williams case was decided the City had already asserted its rights as successor trustee and had procured a judicial determination of its right to receive the trust property.

When in December, 1933 the Indiana Supreme Court held that the Lease was binding on the trust estate, it did not hold that it was binding only for a short period between its decision and the City's taking over of the trust property. Any such interpretation of its decision would completely disregard the surrounding circumstances and is in the teeth of the fact that the plaintiff in that case was seeking to have the Lease removed as "an unlawful cloud upon the title of said Municipal City, as trustee" (II R. 772). Williams was asking that the alleged cloud be removed, not for the few months remaining until the City should become trustee, but for all time. This relief would have been far more significant than a decree that the Lease either was or was not binding for the few months remaining while Citizens Gas still held the trust property. The binding effect of the Lease cannot be divided into various periods of time, as the City contends, and the decision in the *Williams* case necessarily means that the Lease is binding on the trust for its full term of 99 years.

Clearly the City's proposition that the decision in the *Williams* case is not conclusive because the City was not then the successor trustee and received title to and possession of the trust property at a later date is without substance.

4. Since Williams sued in behalf of the trust, the judgment binds the trust and any trustee thereof, although defendants presented no issues to the trustee and prospective successor trustee, their co-defendants.

The City's third proposition on the question of *res judicata* is that the decision in the *Williams* case is not conclusive here because the parties to this case were all co-defendants in the *Williams* case and presented no

issues between themselves in that case (Reply Br. 11). This fact has no significance. Williams sued in behalf of the trust and for the purposes of the suit he replaced the trustee as the representative of the trust. It makes no difference, therefore, what issues, if any, were raised between the trustee itself (the City) and its co-defendants. The law is well settled that in a suit by a beneficiary of a trust in behalf of the trust, in which the trustee is made a defendant, the judgment binds the trust and any trustee thereof, without regard to the issues, if any, raised between the trustee and his co-defendants. The City has never cited any authority denying this well established rule.

The rule just stated fits the *Williams* case precisely. In the first place, Williams sued as a beneficiary of the trust. Thus, in describing themselves, the plaintiffs in the *Williams* case (originally there were two) said (II R. 762):

> "That the plaintiffs Allen G. Williams and Harold L. Bartholomew, each is an inhabitant and taxpayer of the City of Indianapolis in the State of Indiana, and as such bring this suit in the right and behalf, and for the use and benefit, of themselves and of all other inhabitants and taxpayers of said City, similarly situate, any of whom may join as plaintiffs herein."

And again (II R. 764):

> "That *the plaintiffs* are inhabitants and taxpayers of said City of Indianapolis and as such *are cestuis que trustent of the Public Charitable Trust herein defined.*"

As a beneficiary, Williams was entitled to sue in behalf of the trust, the City itself, as Williams alleged (II R. 782-3), having neglected to take action. It is well established that a trustee represents the trust estate and in ordinary circumstances has the exclusive right to prose-

cute or defend actions affecting the rust. However, as stated in 4 *Bogert on Trusts* (§ 870, pp. 2533-4):

> "If the trustee cannot or will not enforce the cause of action running to him for the benefit of the *cestui*, a practical difficulty arises which compels the courts to vary their usual rules as to parties. * * * In the emergency the court permits a suit in equity by the *cestui* to enforce the cause of action running to the trustee, in which the third party and the trustee should be made parties defendant. The *cestui* is not enforcing his own cause of action, but *is acting as a temporary representative of the trust* in order to effect a recovery which will go to the trustee or his successor for the benefit of the *cestui*."

It is clear that Williams was in fact "acting as a temporary representative of the trust." Thus Williams alleged (II R. 770):

> "* * * That said Public Charitable Trust is of the nature of a corporation sole with its beneficiaries the real parties in interest and the equitable owners thereof, and it may be dealt with accordingly in this suit and this right in its behalf these plaintiffs herein now claim and they ask that their said claim be determined and adjudged by this court in this suit."

The court upheld Williams' right to appear for the trust, went into the merits of his claims, and decided the case against him *on the merits.*

Furthermore, the City was expressly made a party to the *Williams* case in its capacity as successor trustee. Williams alleged (II R. 763):

> "That the defendant City of Indianapolis is a municipal corporation and a city of the first class of the State of Indiana and *it is, also, the trustee of said Public Charitable Trust hereinafter described and in each of these capacities it is made a party herein.*"

Thus the *Williams* case was a suit by a beneficiary of the public charitable trust, in behalf of the trust, in which

the origina' trustee and the successor trustee were parties defendant, a: the decision in that case binds the trust and every trustee thereof.

In *Corcoran v. Chesapeake & Ohio Canal Co.*, 94 U. S. 741, this Court disposed of the very contention now advanced by the City. Corcoran was one of several trustees for the benefit of bondholders and was himself a large holder of the bonds. He filed this suit in behalf of all the bondholders to collect payment of interest due and unpaid for many years. This Court said that one of the two issues to be determined was whether the bondholders could recover interest on their overdue interest coupons from the dates of their respective maturities. On this issue the Canal Company, the mortgagor, relied on a prior suit brought by a bondholder, to which suit Corcoran and his co-trustees were parties defendant, as was the Canal Company itself.

In the prior suit the plaintiff therein (the State of Virginia) claimed interest on the coupons which it held, which were of the same class as those upon which Corcoran later sued. The court determined that although interest might be recovered on unpaid interest, such interest was not included in the lien of the mortgage (see 32 Md. 501, 547). In the *Corcoran* case this Court said that the prior suit decided the very point in controversy before it, and that this matter was therefore *res judicata*. Thus the Court said (pp. 744-5):

> "It is said that Corcoran and his co-trustees, the canal company, and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.
>
> "The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and

if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree. It is to be observed, also, that the very object of that suit was to determine the order of distribution of the net revenue of the canal company, and that *the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree.* And, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness cannot now be assailed collaterally on a question of pleading, when it is clear that the issue was fairly made and was argued by Corcoran's counsel, as is shown by the third head of their brief, made a part of this record by stipulation."

The principles applicable to the present situation are the same principles which apply in stockholders' suits brought in the right of the corporation. Thus, in *Dana v. Morgan*, 232 Fed. 85 (C. C. A. 2nd 1916), a stockholder's action had first been brought in a state court to set aside a certain contract on the ground that it was *ultra vires* the corporation. The judgment in the first suit upheld the validity of the contract. Subsequently another stockholder brought a similar action in a federal court to set aside the same contract on the ground that it was procured by fraud. In holding the first judgment a bar to the second action, Judge Rogers said (p. 89):

"* * * And as in such suits the wrong to be redressed is the wrong done to the corporation and as the corporation is a necessary part [party] to the suit, it inevitably follows that *there can be but one adjudication on the rights of the corporation.* And it is undoubted law that the judgment in the state court is an estoppel and a finality *not only as to all matters actually litigated in the suit but also as to all matters which were not but might have been presented to the court and passed upon therein.*"

The similarity between (1) the above suit by a stockholder to set aside the contract between his corporation

and the third party defendant, and (2) the suit by Williams, as a beneficiary of the public charitable trust, to set aside the Lease between the trustee of his trust and the third party defendant (Indianapolis Gas), is apparent. In the above case the court said that "there can be but one adjudication on the rights of the corporation." Likewise, in the instant case there can be but one adjudication on the rights of the trust.

See also:

Ferris v. Udell, 139 Ind. 579, 38 N. E. 180, 186;

Cherry v. Howell, 66 F. (2d) 713, 716 (C. C. A. 2nd. 1933);

Secor v. Singleton, 41 Fed. 725, 727-8 (C. C. Mo. 1890).

In this connection *Elwood v. Beymer*, 100 Ind. 504 (*supra*, p. 80), is of interest. The appellant in that case claimed that (p. 510) "the parties to this record were all defendants, and therefore not, as to each other, adversary parties in the former suit." However, the Indiana Supreme Court ruled that the issues sought to be raised were *res adjudicata*, saying (p. 510):

> "* * * It is none the less true, however, that the appellant might have filed her cross complaint in the former suit, and might then have litigated every matter which she seeks, by her cross complaint in this case, to litigate with the appellees."

In the *Williams* case the issues concerning the validity of the Lease were presented to Citizens Gas and the City, as well as to Indianapolis Gas and the Mortgage trustees, *by the plaintiff Williams*, not by the defendants, and they were all required to take their position with respect to those issues in that case. In fact, as we have seen (*supra*, p. 15), both the City and Citizens Gas took the position that the Lease was binding. They cannot now avoid the binding

effect of the decision in that case merely because they were in agreement with their co-defendants therein and succeeded in procuring a decree adverse to the contentions presented by Williams in behalf of the trust.

5. The Williams case is an authoritative statement of the law of Indiana as to the binding effect of the Lease on the trust and, under the rule of Erie R. R. Co. v. Tompkins, is controlling in all federal courts.

Entirely aside from any questions of *res judicata*, it is clear that the decision in the *Williams* case conclusively settles the law of Indiana as to the very facts which are here presented to this Court. The *Williams* case has conclusively settled, as a matter of Indiana law which is controlling in the federal courts:

(1) That Williams was entitled to maintain his suit in behalf of the public charitable trust.

(2) That the trust and the interests of the beneficiaries therein are "subject to the power of the state to control the Citizens' Gas Company as a public utility" (*supra*, p. 66).

(3) That the action of the Public Service Commission in approving the Lease was a valid exercise of the state's power to control Citizens Gas as a public utility.

(4) That the Lease was within the powers of Citizens Gas.

(5) That the Lease was valid and binding on the trust, on Citizens Gas as initial trustee, and on the City as successor trustee.

(6) That proof of any allegations that the terms of the Lease are burdensome to the lessee would not affect the binding effect of the Lease on the trust and on the City as successor trustee.

We submit that the determination of these questions of Indiana law in the *Williams* case completely disposes of the contentions advanced by the City in the case at bar.

(b) The Order of the Public Service Commission Conclusively Determined That the Lease Is in the Public Interest (Consequently in the Interest of the Trust Also) and in Fulfillment of the Duties of Citizens Gas as a Public Utility.

As previously set forth (*supra*, pp. 6-8), the Lease was approved by the Public Service Commission after extended hearings and an attack on the validity of the Lease by one Fishback, both in the original proceedings and on his petition for a rehearing, in which attack Fishback set forth substantially all the objections to the Lease on which the City now relies. Then Fishback brought suit to set aside the order of the Public Service Commission approving the Lease, in which he reiterated the objections which he had made before the Commission (*supra*, pp. 8-10). The Indiana courts refused to disturb the Commission's order and that order still remains in full force and effect. *Fishback v. Public Service Commission*, 193 Ind. 282; 138 N. E. 346; 139 N. E. 449.

The order of the Public Service Commission approving the Lease (Bill, Exhibit D, I R. 116-22, Offered, II R. 327) is binding as to everyone and cannot be collaterally attacked.

> *Public Service Commission v. Indianapolis*, 193 Ind. 37, 43; 137 N. E. 705, 707 (1922);
>
> *Batesville Telephone Co. v. Public Service Commission of Indiana*, 38 F. (2d) 511, 515 (1930).

In the first case cited the Indiana Supreme Court said (p. 707):

> "If the Commission had jurisdiction and kept within it, and its action was not vitiated by fraud, its deci-

> sion of all questions of fact as to the value of the properties, the sufficiency of the income to pay interest and dividends on the bonds and stocks authorized, *the petitioner's qualifications as a purchaser*, and all other questions which it was required to decide as preliminary to taking action in the matter, is conclusive upon the courts in a collateral action."

In the *Williams* case, speaking of the Lease here in question, the court said (188 N. E. 216):

> "* * * Further *it was within the jurisdiction of the public service commission to consider and approve the lease* and the complaint discloses that the public service commission did approve it. The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the commission in approving the same."

Plaintiff does not contend that the order of the Public Service Commission is conclusive *as to all issues* in this case. Plaintiff *does* contend, however, that the order is a conclusive determination of two matters of fundamental importance (1) that the Lease is in the public interest and consequently in the interest of the beneficiaries of the trust, and (2) that the Lease is in fulfillment of the duties of Citizens Gas as a public utility.

The City admits the first of these contentions when it says that a decision by the Public Service Commission "is conclusive on the courts in a collateral action" and that the Commission determined whether the Lease "was advisable and in the public interest" (Reply Br. 8).

The other matters determined by the Commission upon which plaintiff relies—that the Lease was in fulfillment of the duties of Citizens Gas as a public utility, and that Citizens Gas was such a public utility as the state statute authorized to enter into such a Lease—are of vital significance. These facts were among those which the Commission "was required to decide as preliminary to taking ac-

tion in the matter" of the Lease, and which were, therefore, conclusively established by the Commission's order.

As previously pointed out (*supra*, p. 57), the express statutory authority for public utilities to make leases required that they be made "at a price and on terms fixed by the commission." The price and terms of the Lease were, therefore, expressly subjected to the Commission's control. When the Commission approved the price and terms of the Lease, the power of Citizens Gas, as a public utility, to enter into the Lease superseded any limitations (in fact, as we have seen, *supra*, pp. 58-66, there were none) which might have been involved in the existence of the public charitable trust. In other words, the Commission's order, plus the statute, are conclusive as to the power of Citizens Gas to enter into the Lease.

(c) The Fishback Case.

As we have seen (*supra*, pp. 8-10), in his effort to have the Lease declared void and of no effect, Fishback presented substantially every ground of attack now relied on by the City. The Indiana courts sustained the validity of the Lease and denied Fishback any relief. Plaintiff does not rely on this decision as a binding adjudication between it and the City, but it is a binding adjudication between Indianapolis Gas and Citizens Gas.

The primary importance of this case lies in the conduct of both Citizens Gas and the City in upholding the validity of the Lease during the eight years that the *Fishback* case was pending (*supra*, pp. 9-10). This is compelling evidence in support of plaintiff's claims relating to laches, estoppel and practical construction by the parties (*supra*, p. 70; *infra*, pp. 120, 124, 129).

V. THE CITY HAD AMPLE AUTHORITY TO ACCEPT THE TRUST AND ITS OBLIGATIONS, INCLUDING THE OBLIGATIONS UNDER THE LEASE, AND TOOK THE NECESSARY ACTION TO EXERCISE THAT AUTHORITY.

The City asserts that (Pet. 13):

> "4. Sections 85 and 254 of the Acts of the Indiana General Assembly of 1905* expressly prohibit any such lease for more than 25 years and prohibit its execution without municipal sanction."

This assertion is the basis for the City's argument that in sustaining the validity of the Lease the Circuit Court of Appeals "refused to follow the Indiana decisions that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes" (Pet. 16).

In the argument which follows we shall show that these statutes have no application to this case, that the City had ample authority to take over the public charitable trust and all its accompanying obligations, including those under the Lease, and that the City took the proper steps to exercise that authority.

(a) The City Had Ample Authority to Accept the Trust and Its Accompanying Obligations, Including the Obligations Under the Lease.

The City appears to contend that the Lease is "a contract made in violation of the Indiana statutes" (Pet. 16). However, since the statutes on which the City relies deal solely with the powers and duties of *municipal corporations*, it is clear that the City's argument relates to some supposed prohibition against the City (the powers of *Citizens Gas* in respect of the Lease have already been fully argued, *supra*, pp. 56-74). Furthermore, we are not concerned with the question whether the City itself could have entered into the Lease, for it did not purport to do so.

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* These sections are quoted in full in "Appendix B" to this brief, *infra*, p. 147.

Thus, the question presented here is whether the City had the power to take over the public charitable trust, subject to the obligations under the Lease.

The statutes on which the City's argument is based are part of the Cities and Towns Act of 1905 (Chapter 129 of the Acts of 1905), but the argument fails to take into account the provisions of Section 53 of the same Act. Clause 6 of Section 53 expressly authorizes cities to accept public trusts and to agree to the conditions and terms accompanying them. The pertinent portion of that section has always read (*Burns Indiana Statutes*, 1933, § 48-1407):

> "The common council of every city shall have power to enact ordinances for the following purposes: * * * Sixth. *To receive* gifts, donations, bequests and public *trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out.*"

The City itself relied on this very statute in the *Todd* case, in support of its right to receive the public trust involved in the case at bar. In that case the City correctly interpreted this statute, but gave it an interpretation which is directly contrary to the argument it is now advancing.

In the *Todd* case the plaintiff alleged that under Sections 93 and 249 of the Act of 1905 the City could not acquire the property of Citizens Gas without a popular vote of the electors (PX Stip. 30, II R. 677, 706-8; Offered, II R. 328). To this the City replied (PX Stip. 31, II R. 718, 737, Par. (1); Offered, II R. 328):

> "* * * These defendants admit that said Sections are now in force, but allege that *they have no application whatever to the acquisition by the City of Indianapolis of the plant and property of the Citizens Gas Company* of Indianapolis.
>
> "These defendants say that under the terms of Section 53 of the aforesaid Act of 1905 the Common Council of *said City had power by ordinance to receive and accept public trusts and to agree to conditions and*

terms accompanying the same and bind such City to carry them out, and said defendants further allege that independently of statutory authority said City had power to accept and execute public trusts."

The Court will observe that the City advanced substantially the same argument in the *Todd* case in support of its authority to take over the trust property as that on which we are relying. The City was clearly right in its argument that its trust powers are not subject to the limitations of the Act of 1905. The Circuit Court of Appeals adopted this argument and held that the City had authority to accept the public charitable trust here in question and that its power to do so was not subject to the limitations on its ordinary governmental powers. *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855, 865-6. While the sections of the Act of 1905 involved in the *Todd* case are not the same sections of that Act upon which the City now relies, the rule of law there urged by the City and adopted by the court—that the City's trust powers are not subject to the limitations upon its ordinary governmental powers—is equally applicable to all limitations of the Act of 1905.

There can be no doubt that the City, in taking over the trust property in 1935, was attempting to comply with and claim the advantages of clause 6 of Section 53 of the Act of 1905, as well as the legalizing acts of 1929. This is shown by the language of General Ordinance No. 82—1935, ratifying and approving the steps taken in the acquisition of the trust property. The first section of that ordinance closes with language which parallels very closely the language of clause 6 of Section 53 (quoted above, p. 94). Thus Section 1 of the ordinance concludes (DX 8, III R. 1018-19, Offered, II R. 429):

"* * * and that the public charitable trust in all such plant and property so delivered to and as accepted by said Board of Directors for Utilities be and is hereby received and accepted, and *the City of Indianapolis hereby agrees to the conditions and terms accompany-*

ing such trust and acknowledges itself bound to carry them out."

In addition to the powers conferred by the Cities and Towns Act of 1905, it is clear that the City had the express power to take over the Citizens Gas property, including the Lease, in March, 1929, when it elected to accept the outstanding offer from Citizens Gas, and at all times thereafter. The validating acts of 1929,* prepared by counsel for the City for this very purpose (*infra*, pp. 101-3), leave no doubt on this question.

Section 3 of Chapter 77, Acts of 1929, conferred the following powers, among others, on the Board of Directors for Utilities of the City:

> "(7) *To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city*, and to take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom, *and in event there be any outstanding open mortgage upon the property covered by any such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage* for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions * * *."

In view of the provisions of the Lease here in question (I R. 58) and the provisions of the "outstanding open mortgage upon the property covered" by the Lease (I R. 28), under which provisions "bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by

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* The pertinent portions of Chapter 77 of the Acts of 1929 and all of Chapter 78 of the Acts of 1929 are quoted in "Appendix C" to this brief, *infra*, p. 150. These chapters are frequently referred to as the "validating acts."

such mortgage," there can be no doubt that this statute was prepared and its enactment secured for the purpose of setting at rest any doubt as to the power of the City to take over the Citizens Gas property, *including the Lease*.

Likewise, in Section 1 of Chapter 78, Acts of 1929, the provisions of the Citizens Gas Articles of Incorporation giving the City the right to take over the Citizens Gas property were "legalized and declared to be valid and binding," and this section further provided:

> "Said municipal corporation shall be authorized to accept, hold and own all the property of such corporation so transferred to it, * * * *and any right, title or interest such transferring corporation may have in any lease upon other property.*"

Thus it clearly appears that the acts of the City in taking over the Citizens Gas property subject to all the obligations of Citizens Gas, including those under the Lease, were fully authorized. This exercise of the City's power to accept trusts was not subject to the limitations set forth in the statutes on which the City's *present* argument is based. In addition, the validating acts of 1929 gave the City express power to do these things, and in fact were prepared by the City's counsel for the very purpose of removing any doubt as to the City's powers in this respect (*infra*, pp. 101-3).

The City had full authority to accept the Citizens Gas property, subject to all the obligations under the Lease, and it took proper action to exercise that authority. The latter fact is important because of the City's frequent assertions to the contrary and because it reveals the futility of giving the City the opportunity it demands to present evidence on the "reserved issue" as to whether the City "had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome" (*supra*, pp. 50-51).

The City's frequently repeated assertion that "the lease had no municipal sanction of any kind" (Pet. 13, Par. 4; also pp. 7, 16, 31) is wholly immaterial if it refers to the execution of the Lease in 1913,* and is contrary to the facts if it refers to the City's acceptance of the Citizens Gas property subject to all the obligations under the Lease. As we shall now see, the proper representatives of the City took the necessary action to make the Lease binding on the City by (1) taking over all the trust property, including the leasehold, (2) accepting the assignment of the Lease and taking possession of the leased property, and (3) taking over all the property of Citizens Gas, subject to all its obligations, and executing an agreement indemnifying Citizens Gas against all its liabilities.

(b) The City's Acceptance of the Trust Property Included the Acceptance of the Leasehold Estate and the Obligations Under the Lease.

The City's acceptance of the public charitable trust here in question necessarily involved its acceptance of the leasehold estate. It could not select those parts of the trust estate which were most advantageous to hold and reject those parts which it deemed to be burdensome, particularly after the initial trustee had been in control of the trust property for a period of thirty years. The Circuit Court of Appeals was clearly right when it held that (IV R. 1296-7) "the City is a successor trustee and as such *must accept or disclaim the entire res,*" and the City makes no complaint of that holding.

There can be no doubt that the City did in fact accept the entire trust *res*. Thus, the City expressly admits in the case at bar (I R. 243):

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* As noted above (p. 13), the City admitted in the *Cotter* case that Citizens Gas "*with the full consent and approval of the City of Indianapolis*, entered into a contract whereby it leased from the Indianapolis Gas Company all its plants and property *for a period of ninety-nine years*" (III R. 859).

> "* * * that defendant Citizens Gas Company of Indianapolis conveyed and transferred *all of its property* to the City of Indianapolis subject to all outstanding legal obligations of that Company * * *."

It is also clear that the Court of Appeals correctly analyzed the situation in this case when it said (IV R. 1296):

> "* * * Therefore, if the lease in question is valid, two conclusions follow: (1) the subject-matter of the lease contract is an asset and becomes part of the trust *res*; (2) the lease obligation binds the trust and is not discharged by a mere substitution of trustees."

The City itself recognized the validity of the first of these two conclusions when it said in the *Williams* case "If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust" (II R. 808, quoted more fully p. 104, *infra*). This fact is vitally significant in view of the further fact that in the case at bar the City concedes "for the purpose of this litigation" that the Lease was valid "until the property for which the Citizens Gas Company was Trustee was conveyed to the City" (I R. 145). During this twenty-two year period in which the City says that the Lease was valid it must have been a binding obligation *of the trust estate*, for, as the City admits, the operation of the leased property by Citizens Gas during this period "was as the Trustee of a Public Charitable Trust" (I R. 155, Par. 11). The conclusion inevitably follows that the Lease was a valid and binding obligation of the trust estate, that the leasehold was part of the trust *res* taken over by the City and that the mere change in trustees did not relieve the trust from the obligations under the Lease.

There is no controversy as to whether the City took over the public charitable trust and no doubt the City will not contend that it did not take the proper steps to receive the trust property from Citizens Gas. The record in this case clearly shows that the City did in fact take the proper

steps to accept *the entire trust estate, including the leasehold and its accompanying obligations.* In March, 1929 the City gave notice that it was exercising its right to take over the trust property, and it is clear that at that time it elected to take all the trust property. Thus, on March 20, 1929, the Board of Public Works of the City of Indianapolis adopted a resolution (PX Stip. 22, II R. 670, Offered, II R. 327) which stated that the City (II R. 670):

> "* * * hereby asserts, claims and demands *all rights, title, interests and ownership, of whatever nature or character* granted, reserved, transferred or vested in and to said City *in and to the gas plant, mains and property* of said Citizens Gas Company * * *."

The resolution also stated (II R. 670-71):

> "* * * and demand be and is hereby made upon said Citizens Gas Company * * * that *the plant, property and assets* of said company be conveyed to said City of Indianapolis in accordance with the premises * * *."

The Board of Directors of Citizens Gas responded by a resolution acknowledging "the right of the City of Indianapolis to take over *the property and assets of said Company*" (PX Stip. 23, II R. 672, at 673, Offered, II R. 327). The Board of Trustees of Citizens Gas unanimously approved this resolution by the Board of Directors (Stip. 12(b), II R. 628). These acts by Citizens Gas are significant as showing its interpretation of the City's resolution demanding the transfer of the trust property. The Citizens Gas resolution was brought to the City's attention by the *Todd* case (filed April 30, 1929), if not before (II R. 692, § XV).

Thus the City elected to take over all the property of Citizens Gas and, having made that election, its "power to choose" was exhausted and there could be no withdrawal or change in the terms of the acceptance of the trust property.

Castle Creek Water Co. v. City of Aspen, 146 Fed. 8 (C. C. A. 8th, 1906);

Slocum v. City of North Platte, 192 Fed. 252 (C. C. A. 8th, 1911).

In the first case cited the city had elected to exercise its right to purchase certain water works. The court held that the water works company was entitled to specific performance of the city's agreement to buy its property. Thus the court said (p. 10):

> "* * * *The city had but one option. When it had exercised it, its power to choose was exhausted. An election once made estops the elector. He may not revoke his choice and select another alternative.*"

If there could be any doubt as to the interpretation of the City's resolution exercising its right to take over the trust property, any such doubt would be set at rest by the surrounding circumstances and the City's subsequent conduct in recognizing the Lease as a binding obligation on the trust for its full term and as part of the trust estate which it was requiring the initial trustee to convey to the City.

On March 11, 1929, just nine days before the adoption of the City's resolution demanding the transfer of the trust property, Chapters 77 and 78 of the Acts of 1929* became effective. As we have seen (*supra*, pp. 96-7), these statutes gave the City express authority to take over the leasehold estate and its accompanying obligations, in connection with the taking over of the trust property. As to Chapter 78, the City admitted in its answer in the *Todd* case that (PX Stip. 31, II R. 718, at pp. 729-30, Offered, II R. 328, 333):

> "* * * *said bill was prepared by the legal department and special counsel of the City of Indianapolis* employed for the purpose of bringing about a transfer of the plant and property of the defendant Citizens

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* The pertinent portions of Chapter 77 of the Acts of 1929 and all of Chapter 78 of the Acts of 1929 are quoted in "Appendix C" to this brief, *infra*, p. 150.

Gas Company of Indianapolis to the City of Indianapolis; that *said bill was passed in the exact form prepared and submitted by said counsel for the defendant City* without change or amendment of any kind or character, and that it was introduced in the House of Representatives of the General Assembly by members residing in the City of Indianapolis and elected from Marion County;"

Chapter 78 had an express provision authorizing the City to accept the leased property. Thus it provided:

> "Said municipal corporation shall be authorized to accept, hold and own all the property of such corporation so transferred to it, * * * *and any right, title or interest such transferring corporation may have in any lease upon other property.*"

An examination of Chapter 77 shows that it was prepared in the same way and that it too was enacted for the purpose of authorizing the City to take over *all* the Citizens Gas property, including the Lease. Thus, Chapter 77 applies only to cities "having a population of not less than 300,000," and the City of Indianapolis is and was then the only city having such a population (Stip. 23, II R. 638). Moreover, paragraph 7 of Section 3 of that Chapter (quoted more fully p. 96, *supra*) expressly authorized the board of directors of any utility district:

> "To take over, adopt and *assume the performance of the provisions of any lease* under which any utility property may be held at the time of the acquisition of any utility by any such city, and to take any and all steps necessary to perform and fulfil the terms of any such lease, * * *."

and also authorized such board of directors to operate under any mortgage to which the leased property might be subject.

Thus, in the legislation prepared as a forerunner to the resolution of March 20, 1929, counsel for the City expressly provided for authority to take over, adopt and assume the

performance of any lease held by Citizens Gas. Obviously, these provisions were inserted for the purpose of authorizing the City to take over and assume the obligations of the Lease from Indianapolis Gas to Citizens Gas. This was an unmistakable indication of the City's intentions as expressed nine days later in its demand for the transfer of the trust property. It is evident that the City intended to take over all of the property of Citizens Gas, including the leasehold estate in the Indianapolis Gas property.

In June, 1929 the City filed its answer in the *Cotter** case in which it admitted that Citizens Gas had leased the property of Indianapolis Gas "for a period of ninety-nine years" and "with the full consent and approval of the City of Indianapolis" (PX 89, III R. 859; quoted more fully *supra*, p. 13). The City also recognized the Lease as part of the Citizens Gas property by its answer in the *Todd* case. Thus, it admitted (II R. 719) the following allegation in subdivision IV of the *Todd* complaint (II R. 680):

> "* * * Defendant Company [Citizens Gas] also *is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company*, as created by a certain contract of lease dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana."

The City also recognized the Lease as part of the trust property by joining in the stipulation filed in the *Todd* case (PX 139, III R. 941, 943; quoted *supra*, p. 14). It is plain that no such admissions as these would have been made if the City had intended in 1929 to take only part of the Citizens Gas property and to reject the Indianapolis Gas Lease.

Again, in the *Williams* case, in June, 1931 the City joined with Citizens Gas and a number of the individual

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* *Todd v. Citizens' Gas Company, et al.; Cotter v. Citizens' Gas Company, et al.*; 46 F. (2d) 855 (C. C. A. 7th, 1931).

defendants (officials of Citizens Gas or the City) in a motion to strike parts of the complaint (Stip. 14(b), II R. 631). In moving to strike certain portions of the complaint directed against the Lease, the City and these other defendants said (PX Stip. 37, II R. 804, at 808, Offered, II R. 328):

> "*Second.* The lease of the property of the Indianapolis Gas Company to the Citizens Gas Company *having been validly made*, the actions of any individuals leading up to such lease are wholly immaterial.
>
> "*Third.* The validity of the public charitable trust set up in the complaint is in no wise affected by the validity of such lease. *If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust* and is subject to be administered in the same way as property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid, it would fall without the scope of the trust."

These evidences of the City's consistent construction of its election in March, 1929 to take over the leasehold estate together with the other property and assets of Citizens Gas are of great significance. The City consistently adhered to this construction of its election during the entire period from the preparation of the validating acts in 1929 down to July, 1935, after the City's sale of its Revenue Bonds.

In its resolution offering the Revenue Bonds (quoted pp. 16-17, *supra*), the City's Board of Directors for Utilities described the property to be acquired with the proceeds of the bonds as that "owned by Citizens Gas Company of Indianapolis and or in which it has an interest," and also as "the property operated by Citizens Gas Company of Indianapolis." The form of bond, which was included in the resolution, stated that payment would be secured "by a charge upon all the revenue from the operation of all of the gas system owned and or operated by the City of Indianapolis." When the City referred to the property owned

by Citizens Gas Company "and/or in which it has an interest," to "*the property operated by Citizens Gas*," and to the revenue from the operation of "the gas system owned and/or operated by the City," there can be no doubt that it was describing the entire property of Citizens Gas, including that under lease from Indianapolis Gas.

In the prospectus which it issued to prospective bidders for its Revenue Bonds the City said that "*the system operated by Citizens Gas Company* * * * is in part owned by Citizens Gas Company and *in part is leased by it from Indianapolis Gas Company* * * * The lease is *for a term of 99 years* from October 1, 1913 * * *" (quoted *supra*, pp. 17-18). The prospectus described the leased property and summarized the terms of the Lease and the amounts paid thereunder (II R. 535-6), information which would not have been included if the Indianapolis Gas property were not to be taken over by the City under the Lease. The prospectus also contained this significant statement (II R. 536):

> "The covenants of the lease are for the parties, their successors and assigns."

Thus, the Court of Appeals was clearly correct when it said (IV R. 1291):

> "The unescapable impression, however, from reading the context of the prospectus is that *the leased property was treated as being a part of the utility property subject to the trust.*"

The advertising circular for the Revenue Bonds, approved by the City's counsel, and the brokers' advertisements printed in 45 different newspapers contained the same representations as to the property to be taken over by the City as those in the resolution and the prospectus (see pp. 18-19, *supra*).

In the prospectus, in the resolution authorizing the issuance of the Revenue Bonds, in the form of the bonds itself, in the Halsey-Stuart circular approved by counsel

for the City, and in the newspaper advertisements there were repeated representations that the gas system to be taken over included the property of Indianapolis Gas. Now it is inconceivable that the City of Indianapolis, the members of its Board of Directors for Utilities, and its distinguished counsel were attempting to perpetrate a fraud, either upon Halsey, Stuart & Company or upon the members of the public to whom the bonds were to be sold. The conclusion is inevitable that those representations were made because as late as July 1, 1935, the date of the advertising circular, the City, the Board of Directors for Utilities, and its counsel fully expected to take over the leased property as part of the Citizens Gas system. This conclusion is further supported by the fact that on July 23, 1935 counsel for the City wrote to Indianapolis Gas notifying it that the City would "early in September, take over the property which has been *operated* by Citizens Gas Company" (PX Stip. 58, III R. 836, Offered, II R. 329).

Thus we have at least two official acts of the City of Indianapolis by which it became liable for the obligations under the Lease: (1) The first official act was the resolution of the Board of Public Works demanding the transfer of **all** the trust property, including the Lease. During the period from the preparation of the validating acts early in 1929 down to July, 1935 there were many official acts (*supra*, pp. 101-5) by which the City construed this resolution of March 20, 1929 as an election to take the entire trust estate, *including the Lease*. (2) Another vitally significant official act was that of the Board of Directors for Utilities in September, 1935 in carrying out the resolution of March 20, 1929, by accepting the transfer of *all the trust property* (II R. 467-8; Stip. 17, II R. 635). This act necessarily included the acceptance of the leasehold estate and its accompanying obligations (see pp. 98-9, *supra*).

We shall now discuss another official act by which the City became liable for the obligations under the Lease,

namely, the act of the Board of Directors for Utilities in accepting the assignment of the Lease, having it recorded and taking possession of the leased property.

(c) The City Accepted the Assignment of the Lease, Took Possession of the Leased Property and is Liable by Privity of Estate For the Obligations Under the Lease.

On September 9, 1935, at a meeting of the City's Board of Directors for Utilities, the Board received an assignment of the Lease here in question (Bill, Exhibit F, I R. 127, Offered, II R. 327), sent it to the recorder's office, and had it recorded (II R. 330, 467-8). At the same time the Board took possession of the leased property and has operated it ever since as an integral part of the Citizens Gas system (II R. 350; Stip. 6(c), II R. 622). These facts clearly establish that the City is the assignee of the Lease.

The City's contention that it rejected the assignment of the Lease (Pet. 9) is based on the single fact that when it received the assignment, had it recorded and took over the leased property, it also adopted an *ex parte* resolution *saying* that it rejected the assignment. The significance of this *ex parte* resolution, as contrasted with the affirmative acts taken by the City to accept the Lease, must be judged in the light of the maxim that "actions speak louder than words."

There are many analogous situations in the law where the courts have refused to allow parties to adopt one course by their actions and deny the adoption of such course by some declaration simultaneously made. An example may be found in the law as to accord and satisfaction. It is clear that, when there is a bona fide dispute between a creditor and a debtor as to an unliquidated claim, the acceptance by the creditor of a check designated as payment in full will amount to a full satisfaction, no matter what he says as to his intention in accepting such check.

Neubacher v. Perry, 57 Ind. App. 362; 103 N. E. 805 (1914);

Neher v. Kerr, 70 Ind. App. 363; 123 N. E. 467 (1919);

Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034 (1893);

Seeds, Grain & Hay Co. v. Conger, 83 O. S. 169; 93 N. E. 892 (1910).

An attempt by an assignee of a lease to do one thing and say another was presented to the Supreme Court of Illinois in a case which is in that respect strikingly similar to the one at bar. In *Leiter v. Pike*, 127 Ill. 287; 20 N. E. 23 (1889), a lease had been made for 20 years with an option in the lessee to renew for a further period of 20 years at a rental equal to 6% of the appraised value. The assignee of the lease, Pike, notified the assignee of the lessor, Leiter, that he exercised his right to renew the lease. Leiter replied that the city had condemned part of the property but that Pike could renew as to the remainder of the property if he cared to do so. Appraisers were appointed who appraised the remainder of the property at $300,000.

After negotiations as to the terms of the new lease, Leiter forwarded a lease to Cherry (who was acting for Pike). Cherry retained this lease, made a copy thereof, signed it, and returned it to Leiter with a letter in which he said (pp. 25-6):

> "* * * Now, therefore, I give you notice that I accept the lease signed by you, * * *; and I further give you notice that *in accepting such lease I do not agree to pay the sum of eighteen thousand dollars ($18,000) per annum*, being six (6) per cent. interest on the sum of three hundred thousand dollars, but shall claim that I am entitled to an abatement therefrom of the fair rental value of the west twenty-seven (27) feet of said lots as described in the original lease."

In holding that this was a valid acceptance of the lease by Pike the appellate court said, in language quoted and approved by the Supreme Court (p. 29):

> "* * * His most solemn and deliberate acts evince an acceptance; his words are said to be inconsistent therewith. But saith my Lord COKE: 'When the words are contrarie to the act which is the deliverie, the words are of none effect, *non quod dictum est, sed quod factum est, inspicitur.*' 1 Co. Litt. 36, A. And in *Leake on Contracts*, at page 13, it is said: 'In judging of intention from a person's words and conduct, where his acts are inconsistent with his words, the former are, in general, accepted as a more reliable guide to the intention than the latter; and the conduct may in some cases determine the intention, even in opposition to the words.' Under this rule, which is based on sound reason, it is very clear that Cherry's conduct proves an acceptance of the lease by him, even allowing that the words of his letter to Leiter indicate a contrary intent."

The Supreme Court affirmed the judgment of the appellate court, holding that Cherry had accepted the new lease and that the parties were bound by such acceptance. As to the effect of Cherry's retention of the lease and his simultaneous declaration that he would not agree to pay the rent fixed by the terms thereof, the Supreme Court said (p. 32):

> "* * * The case, then, is precisely as if A., on executing and delivering his bond to B., whereby he obligates himself to pay B. $1,000 at a day named, were to say, 'I shall not consider myself bound to pay you $1,000.' *It is the doing of one thing to which the law attaches a particular effect, and declaring that he intends directly the reverse*, or something which is in legal effect materially different. *That in such case the accompanying declaration is of no legal effect whatever is well settled.*"

The Court will observe the close parallel between Cherry's attempt to keep the lease and repudiate its obli-

gations and the attempt by the City in the present case to repudiate its obligation under the assignment of the Lease, although accepting the assignment, recording it, and taking possession of the property covered thereby. It must be clear that the City's *ex parte* declarations in the resolutions adopted by the Board of Directors for Utilities can have no more effect than the *ex parte* declarations of Cherry to which the Supreme Court of Illinois referred. We submit, in the language of Lord Coke quoted by the Illinois court, "*non quod dictum est, sed quod factum est, inspicitur*," or, in other words, "*not what is said, but what is done, is regarded.*"

The City's assertion (Pet. 9) that Indianapolis Gas consented to the City's taking possession of and operating the leased property is wholly unsupported by the record, except for the period subsequent to March 2, 1936. The earliest *agreement* of any sort between Indianapolis Gas and the City was contained in two letters exchanged between them on September 30, 1935 (DX Stip. 64, 65, III R. 968-9, Offered, II R. 384-5). These letters said nothing whatever about the taking possession of or the operation of the property. They merely referred to certain payments being made and to be made by the City to Indianapolis Gas and said (DX Stip. 64, III R. 968-9):

> "* * * We will make *these payments* without prejudice to our position or rights and you may accept the same without prejudice to your position or rights * * *."

Certainly, these letters, written three weeks after the City took possession of the leased property, cannot be tortured into a consent to the City's *taking possession* of the property three weeks earlier, or to the City's *operation* of the leased property, except in the capacity of an assignee of the Lease. On the contrary, since in these letters the City assured Indianapolis Gas that "you shall be at full liberty to assert, as we understand you do, that said lease is an obligation binding on the City of Indi-

anapolis" (DX Stip. 64, III R. 968), they preserved the rights which had vested in Indianapolis Gas and its Bondholders on September 9, when the City accepted the assignment of the Lease and took possession of the leased property.

Thus, it plainly appears that the City had no right to take possession of the leased property on September 9, 1935, except as assignee of the Lease. The City, by accepting and recording the assignment of the Lease and taking possession of the leased property, made an ineluctable election to become an assignee of the Lease. Neither its *ex parte* resolutions and protestations nor the letters exchanged between the City and Indianapolis Gas three weeks later (which had nothing to say as to the effect of the City's acts on September 9) can relieve the City from the obligations which it incurred on September 9th, when it became an assignee of the Lease.

(d) The City Became Liable, as Successor Trustee, for All the Obligations of Citizens Gas, Including the Obligations Under the Lease.

Among the official acts of the City by which it accepted the trust property subject to all the obligations of Citizens Gas and became liable for all those obligations in its capacity as successor trustee are:

(1) The City accepted instruments of transfer which provided that the property was transferred subject to all the obligations of Citizens Gas, and the property remained subject to those obligations.

(2) The City executed an Indemnity Agreement (Bill, Exhibit J, II R. 306; Offered, II R. 327) by which it agreed to indemnify Citizens Gas against all *liabilities*, thus, in effect, agreeing to pay any liabilities which should be established against Citizens Gas.

(3) The City took all the Citizens Gas property and paid all the consideration to the stockholders and

bondholders, leaving no assets for creditors, and thus became liable for all obligations of Citizens Gas.

We shall discuss each of these official acts briefly.

We have already noted the City's admission in this case (I R. 243):

> "* * * that defendant Citizens Gas Company of Indianapolis conveyed and transferred all of its property to the City of Indianapolis *subject to all outstanding legal obligations of that Company* * * *."

We have also referred to the City's concession that the Lease was valid "until the property for which the Citizens Gas Company was Trustee was conveyed to the City" (I R. 145). In addition, since Citizens Gas has not sought a review of the judgments of the Circuit Court of Appeals establishing the present binding effect of the Lease on Citizens Gas (IV R. 1307-8), the decision of the Court of Appeals that the Lease is binding on Citizens Gas for its full term has become final and conclusive. It necessarily follows that the obligations of the Lease were included when the City took all the Citizens Gas property "subject to **ALL** outstanding legal obligations of that Company."

Thus, one of the official acts by which the trust property was subjected to, or remained subject to, all the obligations of Citizens Gas was the act of the City's Board of Directors for Utilities, in meeting assembled, in accepting the instruments transferring the Citizens Gas property (II R. 467-8), all of which were made expressly subject to all the obligations of Citizens Gas. The deed of the real estate (PX Stip. 55, III R. 833, Offered, II R. 327) recites that the conveyance is made subject to the mortgage to the Bankers Trust Company "and to all other existing liens, incumbrances and assessments of any nature whatsoever." The *next paragraph*, which follows immediately after the language just quoted, reads (III R. 834):

"This conveyance is made *subject also to all other legal obligations* of the Citizens Gas Company of Indianapolis."

The assignment from Citizens Gas to the City of the lease on space in the Majestic Building contains substantially identical language (PX Stip. 56, III R. 835-6, Pars. 2 and 3, Offered, II R. 327). Since one paragraph in each of these two documents specifically provided that the conveyance was subject "to all other existing liens, incumbrances and assessments of any nature whatsoever," it is perfectly apparent that the next paragraph, providing that the conveyance was made subject "*to all other legal obligations of the Citizens Gas Company,*" was not mere surplusage, but was intended to subject the property to **ALL** legal obligations of Citizens Gas.

Moreover, the instrument of transfer and assignment of personal property (Bill, Exhibit E, I R. 122, Offered, II R. 327) states (I R. 125):

"4. This transfer and assignment also are made subject to all other legal obligations of said Company, *including the legal obligations of said Company, if any, under each of the leases hereinafter mentioned.*"

Section 5, which immediately follows the language just quoted, refers to the fact that separate instruments of assignment were being "executed and delivered contemporaneously with this instrument," assigning the 99-year Lease from Indianapolis Gas to Citizens Gas, and the lease on the space in the Majestic Building.

No one disputes that the City accepted the delivery of the deed to the real estate, the assignment of the Majestic Building lease and the instrument of transfer of the personal property and that the City also took over the property covered by those instruments of conveyance. In view of the language contained in those instruments of conveyance as quoted above, there can be no doubt that the transfer and assignment of the Citizens Gas prop-

erty was made subject to *all* the legal obligations of Citizens Gas, including its obligations under the Lease.

It is clear under the law of Indiana, as elsewhere, that anyone who accepts a conveyance of property is bound by all the terms and conditions set forth in such conveyance, and no amount of protestations or reservations can avoid such terms and conditions, if the property covered by the conveyance is accepted.

Haines v. Weirick, 155 Ind. 548; 58 N. E. 712 (1900);
Leach v. Rains, 149 Ind. 152; 48 N. E. 858 (1897);
Midland Railway Co. v. Fisher, 125 Ind. 19; 24 N. E. 756 (1890);
State ex rel. Lowry v. Davis, 96 Ind. 539, 543 (1884);
Louisville N. A. & C. Ry. Co. v. Power, 119 Ind. 269; 21 N. E. 751, 752 (1889);
Cudahy Packing Co. v. City of Omaha, 277 Fed. 49, 53 (C. C. A. 8th, 1921).

An official act by which the City in effect expressly assumed all the obligations of Citizens Gas was the act of its Board of Directors for Utilities in executing and delivering the Indemnity Agreement to Citizens Gas. On September 9, 1935, the Board of Directors and the Board of Trustees of Citizens Gas each adopted resolutions authorizing the transfer of the property of Citizens Gas to the City. As a part of these resolutions each Board required that "prior to making delivery of the foregoing instruments [i.e., the instruments of conveyance] to the said City of Indianapolis, the said officers shall take and receive from the said City an indemnity agreement in the words and figures as follows, to wit: * * *." (Stip. 21(a), II R. 638; PX Stip. 86, 87, III R. 844-5, Offered, II R. 327.) Each resolution then set forth the terms of the indemnity agreement which was required. In pursuance of the requirements contained in these resolutions the City, acting by its Board of Directors for Utilities, executed and delivered to Citizens Gas an

Indemnity Agreement, a copy of which is attached to the Bill as Exhibit J (Stip. 21 (b), II R. 638). That Indemnity Agreement reads in part (II R. 307, Offered, II R. 327):

> "Now, THEREFORE, in consideration of the premises and the conveyance, transfer and assignment as aforesaid, it is agreed by the City of Indianapolis, * * * that it will hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company of Indianapolis, its officers, Directors and Trustees, from any and all loss, damage, costs, charges, *liability* or expense on account of any pending actions or suits which have heretofore been instituted against said Company *and on account of any actions or suits which may hereafter be brought against said Company, arising from any and all acts or actions or omissions to act* on the part of said company of *any nature whatsoever.*"

The Court will observe that the City expressly agreed to "save, defend, keep harmless and indemnify" Citizens Gas from all *liability* arising from *any* acts or omissions to act on the part of said company. There is a well settled distinction in the law between an agreement to indemnify against "loss or damage," on the one hand, and an agreement to indemnify against "liability" on the other. When the agreement is to indemnify against loss or damage, the liability of the indemnitor does not accrue until the indemnitee has actually had to pay the loss or damage in question. On the other hand, when the agreement is to indemnify against *liability*, the indemnitor becomes liable immediately upon the recovery of a judgment against the indemnitee.

Iroquois Underwriters v. State, 211 Ind. 463; 5 N. E. (2d) 908, 910 (1937);

Campbell v. Maryland Casualty Co., 52 Ind. App. 228; 97 N. E. 1026, 1028 (1912);

Ohio Casualty Insurance Co. v. Beckwith, 74 F. (2d) 75, 77 (C. C. A. 5th, 1935).

The Indemnity Agreement protected Citizens Gas against "any and all" *liability*, so that the City becomes liable at once upon the recovery of any judgment against Citizens Gas. It is also clear that the Indemnity Agreement covers the obligatioas of Citizens Gas under the Lease. The Agreement by its express terms covers "*all* acts or actions or *omissions to act* on the part of said company *of any nature whatsoever.*" Obviously, these unlimited provisions covered the omission of Citizens Gas to fulfill its obligations under the Lease.

The City also became liable in equity for all the obligations of Citizens Gas as a consequence of its action in taking all the property of Citizens Gas and paying the entire consideration therefor to the stockholders and bondholders of Citizens Gas. The consideration for the transfer of the Citizens Gas property was given by the City directly to the stockholders and bondholders of Citizens Gas (Stip. 16, II R. 634-5), leaving Citizens Gas with no assets out of which to satisfy its obligations (Stip. 17(e), II R. 635). As a matter of law, the City thereby became responsible for all the liabilities of Citizens Gas.

> *Central Improvement Co. v. Cambria Steel Co.*, 210 Fed. 696, 706, 708-9 (C. C. A. 8th, 1913)—affirmed by the Supreme Court under name of *Kansas City Southern Ry Co. v. Guardian Trust Co.*, 240 U. S. 166 (1916);
>
> *Louisville N. A. & C. Ry. Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 433-4;
>
> *C. C. C. & St. L. Ry. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367 (1893);
>
> *Seattle Investors Syndicate v. West Expendable Stores*, 177 Wash. 125, 30 P. (2d) 956, 957 (1934).

Still another official act by which the City became subject to the obligations under the Lease is the act of the

City Council in enacting "General Ordinance No. 82-1935" (DX 8, III R. 1017, Offered, II R. 429). By this Ordinance the Council formally ratified and approved all that the Board of Directors for Utilities had done in connection with the transfer of the trust property (III R. 1018). The Ordinance also stated that the public charitable trust (III R. 1019) "is hereby received and accepted, and the City of Indianapolis *hereby agrees to the conditions and terms accompanying such trust* and acknowledges itself bound to carry them out."

Among the "conditions and terms accompanying such trust" which the City Council thus formally accepted and agreed to were:

> (1) The acceptance of the conveyances subject to **ALL** obligations of Citizens Gas.
>
> (2) The execution of the Indemnity Agreement.
>
> (3) The payment of all consideration for the property to the stockholders and bondholders of Citizens Gas, thus leaving no assets for creditors.

By this express acceptance of these "conditions and terms" the City Council necessarily agreed that the City as successor trustee was assuming the obligations of Citizens Gas and was accepting the trust property subject to all those obligations.

The various acts of the City's counsel, its Board of Public Works and its Board of Directors for Utilities, and this Ordinance leave no doubt that the proper municipal authorities have taken the requisite action to make the Lease binding on the City as successor trustee. Clearly, the City's statement that "*no municipal authority* having the power to do so ever authorized the execution of the lease, ratified it or *agreed to be bound by its terms*" (Pet. 7) is directly contrary to the facts established by the record.

VI. THE CONTINUED ACQUIESCENCE IN THE VALIDITY OF THE LEASE BY CITIZENS GAS AND THE CITY FOR 22 YEARS, THEIR ACCEPTANCE OF THE BENEFITS UNDER THE LEASE, AND THEIR REPRESENTATIONS AS TO ITS BINDING EFFECT ON THE TRUST PRECLUDE BOTH OF THEM FROM ATTACKING THE LEASE.

One of the grounds on which the City relied for the allowance of writs of certiorari was its assertion that the Court of Appeals "refused to follow the Indiana decisions set out below on estoppel of a City" (Pet. 15). The fact is that the Court of Appeals made no decision on the question of estoppel *in pais*. In both of its petitions for rehearing in that court the City admitted, as to the estoppel of the City, that "there is no express holding to that effect" (IV R. 1313, Par. 7; IV R. 1351, line 1). The Court of Appeals can hardly have disregarded the Indiana decisions on a question as to which it made no holding.

The Court will notice that the City has made no reference to the importance of the conduct of Citizens Gas and the City during the 22-year period from 1913 to 1935 as

(a) showing the **practical construction** of the Articles and Franchise of Citizens Gas;

(b) showing the **practical construction** of the City's exercise in 1929 of its rights under those instruments; and

(c) creating a situation which precludes Citizens Gas and the City from denying the validity of the Lease because of their **laches.**

It is apparent that City's counsel ignore these facts because the conclusion is inescapable that the City and Citizens Gas construed the Franchise and Articles of Citizens Gas as giving it the power to enter into the Lease for 99 years (*supra*, pp. 70-74) and construed the City's resolution of March 20, 1929 as an election to take *all* the Citizens Gas property, including the leasehold estate (*supra*, pp. 101-06).

Likewise, the City ignores the fact that for a period of 22 years Citizens Gas accepted the benefits of the Lease and the City and the beneficiaries of the trust had all the benefits derived from the operation of the leased property as an integral part of the trust property (*infra*, pp. 129-30). This fact and the further fact that the *status quo* cannot be restored are of vital importance with respect to the claim that the Lease was beyond the powers of Citizens Gas. Even if we suppose for the purposes of argument that the Lease was *ultra vires* Citizens Gas, the facts just referred to would preclude both the City and Citizens Gas from denying their liability under the Lease. It is well settled law in Indiana that a corporation which has had the benefits of a contract and which cannot restore the *status quo* cannot refuse to perform its part of the bargain on the ground that the contract was beyond its powers.

Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 909 (1889);

Huntington Brewing Co. v. McGrew, 64 Ind. App. 273, 112 N. E. 534, 536-7 (1916);

Frank Bird Transfer Co. v. Massachusetts Bonding & Ins. Co., 86 Ind. App. 259, 153 N. E. 816, 818-19 (1926).

The City was clearly right and correctly interpreted the Indiana decisions when, in its capacity as successor trustee, it said in the *Williams* case (PX Stip. 37, II R. 807, Offered, II R. 328):

> "Third. It appearing that the lease so approved by the Public Service Commission has been in full force and effect for nearly 17 years and that many millions of dollars have been expended in reliance upon its validity, *all persons* including plaintiffs (if they have any standing under any circumstances) *are estopped to question the validity of the same.*"

This statement was even more applicable five years later, when the City first asserted that the Lease was not binding

for its full term. The City's *present* contentions are directly contrary to those advanced by it in the *Williams* case. It was right in the *Williams* case; it is wrong now.

Although the Court of Appeals made no express holding on the question of estoppel, it would have been fully warranted in holding that both Citizens Gas and the City are estopped to deny that the Lease is valid for its full term. We shall first discuss the estoppel against Citizens Gas, which is equally binding upon the City.

(a) Citizens Gas is Estopped by its Conduct From Denying That the Lease is Valid for its Full Term.

It should be noted here that it is not essential to the City's liability that *it* be estopped by its own conduct or that *it* be precluded by the acceptance of benefits under the Lease, since it became liable for all the obligations of Citizens Gas (*supra*, pp. 111-17). The liabilities of Citizens Gas, predicated on its own laches or the estoppel against it, are among those liabilities to which the trust property is subject in the hands of the City. This same result follows as a matter of law from the fact that the City, as successor to Citizens Gas as trustee, is in privity with Citizens Gas and is, therefore, bound by any laches of or estoppel against Citizens Gas and by the adjudications to which Citizens Gas was a party.

Northern Pacific Ry. Co. v. Slaght, 205 U. S. 122, 128 (1907);

Bedon v. Davie, 144 U. S. 142 (1892);

Knerals v. Florida Central & P. R. Co., 66 Fed. 224, 233 (C. C. A. 5th, 1894); *certiorari* denied 159 U. S. 257;

Mull v. Orme, 67 Ind. 95, 98 (1879);

Roller v. Catlett, 118 Va. 185; 86 S. E. 909, 910 (1915).

Perhaps the most compelling reasons that estop Citizens Gas to deny the validity of the Lease for its full term

arise from the various adjudications of the validity of the Lease in proceedings to which Citizens Gas was a party and in which it insisted upon the validity of the Lease. Before the Public Service Commission, in the *Fishback* case, and in the *Williams* case Citizens Gas insisted that the Lease here in question was valid and that it had power and authority to make such a Lease. In each instance this contention was sustained. There are, however, other equally compelling reasons why Citizens Gas is estopped to deny that the Lease is valid for its full term of 99 years.

We have set forth above (pp. 10-11) some of the representations made by Citizens Gas through Blodget & Company in connection with the sale of Indianapolis Gas Bonds. Without duplicating those quotations we call the Court's attention to a few other instances in which Citizens Gas asserted that it had leased the Indianapolis Gas property for 99 years for a rental which included payment of the interest on the Bonds.

In 1916 the following representation was made through Blodget & Company (PX Dep. 9, II R. 694, Offered, II R. 420, 563):

> "* * * In October, 1913, with the consent of the Public Service Commission of Indiana, the Indianapolis Gas Company was leased to the Citizens Gas Company *for 99 years*, whereby the latter company controls the entire gas business of Indianapolis. As a part of the lease, the Citizens Gas Company guaranteed the interest on the Indianapolis Gas Company bonds, their refunding at maturity and 6% dividends on its $2,000,000 capital stock."

Beyond this, the excerpts from Poor's and Moody's Manuals (PX 95A-98A, 99-110, III R. 905-922, Offered, II R. 358-9) show a continuous representation during all the period from 1915 to 1935 that Citizens Gas had leased the property and business of Indianapolis Gas for 99 years, and that by the terms of the Lease Citizens Gas paid the

interest on the Bonds. For example, Poor's Manual of Public Utilities for 1922 states (PX 96-A, III R. 907):

> "By the terms of the merger the Citizens Gas Co. leases the property of The Indianapolis Gas Co. *for a period of 99 years* and pays the interest on $4,833,000 Consolidated Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extensions to the leased property. * * *"

Moody's Manual of Public Utilities for 1923 states (PX 98-A, III R. 912-13):

> "By the terms of the lease, the Citizens' Gas Co. leases the property of the Indianapolis Gas Co. *for a period of 99 years* and pays the interest on $4,833,000 Consolidated Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extensions to the leased property. * * *"

A statement substantially identical with the one just quoted appeared in Moody's Manual each year from 1924 to 1934, inclusive (PX 99-109, III R. 915, Offered, II R. 359).

The various representations that the Lease was valid and binding for its full term were so widespread and so continuous over a period of more than 21 years that they must have come to the attention of any of the investing public who were at all interested. The public purchased Indianapolis Gas Bonds which were issued after the making of the Lease (Stip. 3 (e), II R. 619-20; 10 (a), II R. 627) and marketed upon representations that Citizens Gas had a 99 year Lease and had guaranteed the payment of interest and the refunding of the Bonds. There can be no doubt that the investing public was not only induced to buy but was induced to continue to hold the Bonds of Indianapolis Gas as a result of the representations made by Citizens Gas continuously over a period of more than 21 years.

Having sold the Indianapolis Gas Bonds on the representation that Citizens Gas had a 99 year Lease and would pay the interest on the Bonds during that period,

and having made the same representation to the investing public through Poor's and Moody's Manuals over a period of more than 20 years, and having insisted, whenever the question arose in litigation, that the Lease was valid for its full term and binding on itself and the beneficiaries of the trust, it is clear that Citizens Gas is estopped from denying that the Lease is a binding obligation over the entire 99 year period of the Lease.

The City asserts (Pet. 12) that plaintiff did not prove that any Bondholders relied on the representations concerning the Lease. However, the rule is well established that where representations have been made in the course of a transaction, *it is assumed in the absence of facts showing the contrary* that the representations were relied on. In other words, *the defendant* bears the burden of showing that the representations were *not* relied upon.

Section 1515 of the recent edition of *Williston on Contracts* contains the following statement (5 *Williston*, p. 4229):

> "* * * *Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary,* **it will be presumed** *that the representations were relied on.*"

This statement is fully substantiated by the following authorities, among others:

Restatement of the Law of Contracts, Section 479;

Hicks v. Stevens, 121 Ill. 186; 11 N. E. 241, 243 (1887);

Wilson v. Carpenter's Administrator, 91 Va. 183; 21 S. E. 243, 245 (1895);

Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975, 976 (1911);

Batson v. Alexander City Bank, 179 Ala. 490; 60 So. 313, 316 (1912);

Holbrook v. Burt, 22 Pick. 546, 552 (Mass. 1839).

The application of these authorities to the situation here before the Court is clear. Over a period of many years Citizens Gas in selling its Indianapolis Gas Bonds represented that it had a 99 year Lease on the mortgaged property and that it had guaranteed the payment of the interest and the refunding of the principal on the Bonds. It is difficult to imagine any representations which could have been more material in inducing prospective purchasers to buy these Bonds. Under these circumstances it was not incumbent upon plaintiff to produce any Bondholders to state expressly that they had relied on these representations. On the contrary, the burden was upon the City and Citizen Gas to show that these representations were *not* relied upon. No attempt has been made to sustain this burden.

(b) The City is Estopped by Its Own Conduct From Denying That the Lease is Valid for Its Full Term.

The City is estopped by its own conduct, as well as that of Citizens Gas, from denying that the Lease is valid for its full term. We have already discussed the City's conduct in the proceedings before the Public Service Commission, in the *Fishback* case, in the *Todd* and *Cotter* cases, and in the *Williams* case (*supra*, pp. 6-16). We have also shown that from the time of the resolution of March 20, 1929 demanding the transfer of the trust property, until July, 1935, the City openly took the position that the Lease was valid and part of the trust estate and showed by its conduct that it was intending to take over the leasehold as part of the trust property (*supra*, pp. 101-06).

As stated above (p. 8), all defendants in the case at bar have admitted (I R. 137, 149, 223) the allegations in subdivision 8 of the Bill that (I R. 9-10):

> "In all of the proceedings before the Public Service Commission * * * the defendant, the City of Indianapolis, was duly served with notice to appear and

through its duly appointed and authorized counsel did in fact appear and participate therein. *No objection* by petition to said Commission or otherwise *was ever made by said City of Indianapolis either to the execution of said lease or to the orders made by said Commission*, * * *."

With reference to the *Fishback* case plaintiff alleges in subdivision 9 of the Bill (I R. 11):

"Before said cause came on to be heard the defendant, the City of Indianapolis, through the Board of Public Works thereof had formally accepted and recognized said lease by requiring extensions to be made in the lines and mains of The Indianapolis Gas Company, as provided in subsection 6 of section 27½ of said lease, *which provision had been inserted in said lease at the instance of the City of Indianapolis*, * * *."

Indianapolis Gas and Citizens Gas admit this allegation in its entirety (I R. 137, 224). The City admits all the facts thus pleaded (I R. 151), but denies the inference that such facts amounted to an acceptance and recognition of the Lease (II R. 320-1). The fact that this admission by the City was deliberate and carefully considered is shown by the fact that this denial was first made by an amendment filed more than 2 years after the answer, at which time the original admission was no doubt closely scrutinized (II R. 320-21).

In its answer in the *Cotter* case, filed June 4, 1929, the City admitted that the Lease was made "with the full consent and approval of the City" (PX 89, III R. 847, at 859, Offered, II R. 334, III R. 1057). In this answer the City also admitted (III R. 860):

"* * * that since 1913 the Citizens Gas Company *with full knowledge and consent of the City* has operated the combined properties under the provisions specified by the Commission * * *."

(These admissions are quoted more fully at pages 13-14 above.) In other words, the City admitted that at that time Citizens Gas had operated under the Lease for nearly sixteen years "with full knowledge and consent of the City."

It therefore appears by the City's own admissions that it participated in the proceedings before the Public Service Commission, that the Lease was entered into "with the full consent and approval of the City"; that at least one provision "had been inserted in said lease at the instance of the City"; that the City soon required compliance with this provision; that the City never made any objection to the execution of the Lease; that it has never sought to prevent the order of the Public Service Commission approving the Lease from being carried into effect; and that, on the contrary, "since 1913 the Citizens Gas Company with full knowledge and consent of the City has operated the combined properties under the provisions specified by the Commission * * *."

The City asserts that no Bondholder "relied on or was influenced by any acts of the City" (Pet. 29). Our answer to this same contention with respect to the estoppel against Citizens Gas (*supra*, pp. 123-4) is equally applicable here. Furthermore, the representations concerning the Lease were sufficiently important and widespread and continued over such a long period of time that the City owed the duty to speak if it had any intention to disavow those representations or to repudiate the Lease. The City could not blind its eyes to these representations as though it had no interest in the public charitable trust and the conduct of Citizens Gas in the management of its affairs. As prospective trustee and as the representative of the inhabitants of the City, the beneficiaries of the trust, the City was interested in the conduct of Citizens Gas and the obligations it incurred, particularly since the City might later become subject to those very same obligations. As

we have seen, the City on numerous occasions did in fact state its position concerning the Lease and in each case, over a period of more than 22 years, it took the position that the Lease was a valid and binding obligation for its full term.

The only other argument by which the City seeks to avoid the estoppel against it is that the estoppel "cannot be founded upon acts done by municipal officers in excess of their authority" (Pet. 29). The acts of the municipal officers which estop the City to deny the validity of the Lease are in complete accord with the various official acts of the duly authorized representatives of the City by which the City incurred the obligations of the Lease (*supra*, pp. 98-117). Also, the City has never questioned the authority of any particular officer to do any of the acts upon which plaintiff's claim of estoppel is based, either in the case at bar, or, so far as we are advised, in any other case or at any other time. The City's only contention in this respect has been that the various acts in question were not authorized because they were prohibited by certain statutes. This contention has already been shown to be wholly devoid of any foundation (*supra*, pp. 93-8).

The case of *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271 (C. C. A. 8th, 1896) is of peculiar interest in connection with the City's efforts to avoid an estoppel. The trustee of a mortgage by a water company brought a suit to foreclose, in which it also sought to recover from the city on its liability to pay hydrant rentals. The District Court denied recovery against the city and the trustee appealed. The city had contracted for the erection of the water works, which contract included certain terms as to its payment of hydrant rentals. In 1887 the city council formally approved the water works plant, acknowledging that it had been properly finished and put in operation. Thereafter the money was loaned to the water company and the mortgage deed pledged the company's rights

against the city under the contract to pay hydrant rentals. In 1891 the city attempted to repudiate the contract and claimed that the ordinance was invalid because it was to continue in effect for a period of 21 years and because it was not approved by the necessary majority of the council. In denying these arguments and holding that the city was estopped to deny its liability after bonds had been sold to the public in reliance upon the statements and representations of the city, Judge Sanborn, speaking for the court, said (p. 293):

> "There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that *it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract, which its records and its conduct have constantly made, and in reliance upon which,* the gas company and the water company constructed and extended the waterworks, and the *bank and the bondholders loaned their money.* No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. * * *
>
> "In a business transaction like that of procuring the construction of waterworks and the use of water for itself and its inhabitants, *a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations.*"

Language more closely applicable to the facts of the case here before the Court could hardly have been written if Judge Sanborn had had our precise situation before him. Over a period of 22 years both Citizens Gas and the City joined in insisting before the Public Service Com-

mission, in the *Fishback* case, in the *Williams* case, and in many other ways, that Citizens Gas had a 99-year Lease of the property of Indianapolis Gas and that the Lease was valid and binding for its full term.

We submit, to use Judge Sanborn's language, that neither the City nor Citizens Gas can "be heard to deny the truth of the representations of the existence and of the execution of this contract, which its records and its conduct have constantly made, and in reliance upon which * * * the bondholders loaned their money."

(c) The City is Precluded by Its Own Laches and the Laches of Citizens Gas From Denying That the Lease is Valid and Binding For Its Full Term.

The laches of Citizens Gas and the City which preclude the City from denying that the Lease is binding on the public charitable trust for its full term are demonstrated by the following facts:

1. Citizens Gas operated under the Lease for substantially 22 years, during all of which time Citizens Gas and the beneficiaries of the trust enjoyed all the benefits from the use of the leased property. These benefits included not only the income derived, but also the unquestioned public benefit flowing from the elimination of competition and the duplication of facilities. Upon the execution of the Lease Indianapolis Gas abandoned its operating personnel and ceased its efforts to expand its system. Citizens Gas has greatly improved its competitive situation as a result of the Lease and it has so unified the plants and systems of the two companies that it would be difficult, if not impossible, for Indianapolis Gas to resume independent operations at this time (II R. 349-50). This increasingly disadvantageous situation of Indianapolis Gas is of vital concern to the Bondholders, to whom Indianapolis Gas now owes more than $8,500,639, and is important to plaintiff as trustee of the security for that indebtedness.

It is impossible to estimate at this time the full extent of the benefits accruing to the public charitable trust from the elimination of competition, for it is impossible to say what extensions Indianapolis Gas might have made if it had been left free to expand and extend its operations. The facts affirmatively appear, however, that the competition of Indianapolis Gas was regarded as "dangerous to the company and the community" (*supra*, pp. 6-7); that Indianapolis Gas was in the course of building new by-product coke ovens when the Lease was executed (Lease, § 9, I R. 60-1; PX 91, III R. 886, at 894); and that the anticipated profits to Citizens Gas and the community from the proposed Lease were very substantial (PX 91, III R. 886, at 889-93, Offered II R. 342).

2. The loss of available evidence and witnesses is one of the well established grounds for invoking the defense of laches. The facts as they existed in 1913 are necessarily difficult if not impossible to establish at this time. This is borne out by the fact that even the pleadings before the Public Service Commission have disappeared and cannot be found (PX 88, III R. 846, Offered, II R. 331) and most, if not all, of the evidence submitted at that time is no longer available. Mr. Forrest, who acted as General Manager of Citizens Gas during all of this critical period, had died before the trial and was unavailable as a witness. His testimony alone would have been invaluable to the plaintiff. There is no reason to doubt that he would have substantiated on the witness stand the statements which he made to the stockholders of Citizens Gas (PX 91-94, III R. 886-904, Offered, II R. 342), to The Union Trust Company of Indianapolis (PX 90, III R. 879, Offered, II R. 356) and to Blodget & Company (PX Dep. 10, II R. 607, Offered, II R. 420, 564). The significance of these statements clearly appears from the representative excerpts therefrom quoted above (pp. 6-7).

3. The City was a party to proceedings in which the effect of the Lease on the public charitable trust was fully presented and in which it was incumbent on the City to speak if it had any intention of ever repudiating the Lease. This was the situation in the Public Service Commission proceedings and in the *Fishback* case, before the City demanded the transfer of the trust property. In March, 1929 the City notified Citizens Gas that it was exercising its right to take over the trust assets. From that time on the City had an even more direct and immediate interest in the question whether the Lease was binding on the trust. In March, 1930 Williams sued in behalf of the public charitable trust to remove the Lease as "an unlawful cloud upon the title of said Municipal City, as trustee" (II R. 772). In that suit, where the rights of the City itself as successor trustee were directly involved, the City asserted that the Lease was valid and that the question of its validity was foreclosed by the decision of the Public Service Commission and by the failure to raise the question over a period of 17 years (II R. 806-8).

From the time of the initial proceedings before the Public Service Commission, the City had numerous opportunities to speak and assert the supposed rights now set up, and in each instance the City either failed to speak or took the affirmative position that the Lease was valid and binding on the public charitable trust. Plainly, on each of these occasions, every consideration of justice required the City to speak or forever after hold its peace.

In *Ryason v. Dunten*, 164 Ind. 85; 73 N. E. 74 (1905), the Indiana Supreme Court quoted with approval the following statement of Mr. Justice Brewer* (p. 77):

> "'No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resur-

* This quotation is taken from an opinion written by Mr. Justice Brewer when sitting on Circuit. *Naddo v. Bardon*, 51 Fed. 493, 495 (C. C. A. 8th, 1892).

rection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many.' "

The attempt of the City to *attack* the validity of the Lease after the lapse of 22 years during which it not only *acquiesced in* but *insisted upon* the Lease being held valid, presents a case in which, in the language of Chief Justice Fuller, "The hour-glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused." *

VII. THE RULE OF ERIE RAILROAD COMPANY v. TOMPKINS REQUIRED THE DECISION MADE. THE CIRCUIT COURT OF APPEALS AND THE COURT FULLY COMPLIED WITH THAT RULE.

The rule of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, required the result reached by the Circuit Court of Appeals. Every Indiana decision bearing upon the validity of the Lease compels the conclusion that it is valid for its full term. The City's *present* contentions as to the validity of the Lease were all conclusively negatived, *as a matter of Indiana law*, in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212 (see p. 89, *supra*). Entirely aside from the question of *res judicata*, that decision conclusively established the law of Indiana which the Court of Appeals was bound to follow.

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* *Hammond v. Hopkins*, 143 U. S. 224, 274 (1892).

The City's assertion that "The Circuit Court of Appeals wholly disregarded the applicable Indiana law in four important particulars" (Pet. 12) is wholly unfounded. Let us examine briefly the respects in which the Court of Appeals is alleged to have disregarded the applicable Indiana law:

(1) *Estoppel against the City* (Pet. 12, 15). The Court of Appeals made no holding on the question of estoppel *in pais*, although it would have been fully warranted in doing so (*supra*, pp. 120-9). That court cannot have disregarded the Indiana law on a question as to which it made no holding.

(2) *Res judicata* (Pet. 12, 15). The City admits (Reply Br. 8) that the decisions of the Public Service Commission are "conclusive on the courts in a collateral action" and that the Commission decided that the Lease "was advisable and in the public interest." In addition, the *Williams* case conclusively determined all the issues here presented as to the validity of the Lease. The City's arguments—that the applicable Indiana cases demonstrate that the decision in the *Williams* case is not *res judicata*—have been shown to be wholly unfounded (*supra*, pp. 76-89).

(3) *Construction of grants by a municipality* (Pet. 13, 15). The decision of the Court of Appeals that Citizens Gas had power to execute the Lease and make it binding on the public charitable trust for its full term is fully supported by the facts and by the law applicable thereto (*supra*, pp. 56-74). That decision is in complete accord with the decision of the Public Service Commission in 1913, the decision in *Fishback v. Public Service Commission*, 193 Ind. 282, 138 N. E. 346 (1923), the decision in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212, 215-16 (1934), and the uniform practical construction of the Franchise and Articles by Citizens Gas and the City over a period of 22 years. None of the cases relied upon by the City have

any tendency to indicate that Citizens Gas did not have full authority to make the Lease.

(4) *The alleged statutory prohibitions* (Pet. 13, 16). The statutes on which the City relies do not apply to its power to receive trusts and "to agree to conditions and terms accompanying the same" (*supra*, pp. 93-5). Beyond that, the validating acts of 1929 remove any possible doubt as to the authority of the City to take over this particular trust, including the leasehold estate and its accompanying obligations (*supra*, pp. 96-7).

It is, therefore, clear that in upholding the validity of the Lease for its full term the Circuit Court of Appeals followed the controlling Indiana decisions and thereby conformed to the rule laid down by this Court in *Erie R. R. Co. v. Tompkins*.

VIII. THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT PLAINTIFF'S JUDGMENT SHOULD INCLUDE INTEREST ON THE COUPONS AFTER THEIR MATURITY AND INTEREST ON THE JUDGMENT ITSELF, BUT IN EACH CASE THE RATE OF INTEREST SHOULD BE SIX PER CENT.

The fact that the Circuit Court of Appeals awarded plaintiff interest on the unpaid coupons from the dates of their respective maturities and interest on the judgment itself was not urged as a ground for allowing a writ of certiorari in this case. Also, the City did not argue these questions in the Court of Appeals, either in its original briefs or in either of its petitions for rehearing (IV R. 1309, 1343). Thus, under the well settled procedure of this Court, plaintiff's right to interest on interest and to interest on the judgment itself is not open to dispute in this Court.

Kessler v. Strecker, 307 U. S. 22, 34 (1939);
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 177-9 (1938);

Connecticut Ry. & L. Co. v. Palmer, 305 U. S. 493, 496 (1939).

Furthermore, plaintiff's right to interest both on the unpaid and overdue coupons and on the judgment itself clearly appears. Each Bond bears a coupon with the blanks appropriately filled in but otherwise reading as follows (I R. 27):

"COUPON.

$25.00.

"THE INDIANAPOLIS GAS COMPANY will pay to the bearer, at the office of the Trust Company of America in the City of New York, Twenty-five dollars in gold coin of the United States of America, on the first day of ....., being six months' interest on its First Consolidated Mortgage Five Per Cent. Gold Bond No. .....

.....

Treasurer."

It is clear under the law of Indiana, as it is throughout the country, that such coupons bear interest after maturity at the legal rate of interest. In *City of Jeffersonville v. Patterson*, 26 Ind. 15 (1866), the Supreme Court of Indiana, speaking through Chief Justice Gregory, expressly held that coupons bear interest after maturity at the rate of 6% per annum. Thus the court said (p. 16):

> "We think that the interest warrants in question, according to commercial usage, and under our statute, bear interest from maturity."

Similarly, in *Gelpcke v. Dubuque*, 68 U. S. (1 Wall.) 175 (1863), this Court said (p. 206):

> "Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed."

The Indiana law on this question is clearly stated in *Burns Indiana Statutes*, 1933, § 19-2003, which provides that:

> "On money due on any instrument in writing, * * * interest shall be allowed at the rate of six dollars ($6.00) a year on one hundred dollars ($100.00)."

As to interest on the judgment, Section 966 R. S. (28 U. S. C. § 811) specifically provides that interest shall be allowed on all judgments in civil causes in a district court where, by the law of the state in which the the district court is held, interest may be recovered in a similar action in the state courts. Thus we are remitted to the Indiana law to determine the rate of interest recoverable on the judgment.

The Indiana statutes expressly confer the right to interest "on judgments for money" (*Burns Indiana Statutes, 1933*, § 19-2002, quoted *infra*, p. 137). Therefore, there can be no doubt that the Court of Appeals was correct in awarding plaintiff interest on the overdue coupons and on the judgment itself.

The *rate* of interest allowed by the Court of Appeals in each instance was, however, 5% only, whereas it is apparent that the correct rate in each instance is 6%. The difference between these two rates amounted to over $30,000 as of October 1, 1940. The issue as to the proper rate to be applied to the two situations in question was presented by plaintiff's cross-petition for writs of certiorari (Nos. 423 and 424).

Under the provisions of the Indiana law it is clear that the rate of interest on the overdue coupons should be 6%. The controlling statute provides that interest at the rate of 6% shall be allowed "on money due on any instrument in writing" (*Burns Indiana Statutes, 1933*, § 19-2003, quoted more fully above). Each unpaid coupon is an "instrument in writing" and comes within the express provisions of this statute.

See also *Gale v. Cory*, 112 Ind. 39, 13 N. E. 108 (1887) and the opinion in the same case on petition for rehearing, *Gale v. Cory*, 112 Ind. 39, 14 N. E. 362, at 363.

The Indiana statutes also clearly provide for interest at the rate of 6% on "judgments for money." Thus, the statute which applies to this situation reads:

> "§ 19-2002. *Judgments for money—interest on*—Interest on judgments for money, whenever rendered, shall be from the date of the return of the verdict or finding of the court, until the same is satisfied, at the rate per cent agreed upon in the original contract sued upon, not exceeding eight (8) per cent where the obligor in such contract is a person other than a corporation; and if there be no contract by the parties, then at the rate of six (6) per cent per annum." (*Burns Indiana Statutes, 1933.*)

The overdue interest coupons involved in this case each contain a promise to pay $25 and each coupon constitutes the "original contract sued upon." The coupons, however, are silent as to the rate of interest to be paid *on the coupons* themselves. There is, therefore, no "rate per cent agreed upon" as to the coupons, thus making the express provisions of the above statute directly applicable to this case.

The Circuit Court of Appeals held that the parties had themselves specified the rate of interest to be paid on the overdue coupons and that the contract of the parties on the subject superseded the provisions of these statutes (IV R. 1305-6). This holding that there are contractual provisions which specify the rate of interest is based on (1) the statement in each coupon that the $25 to be paid thereon is "interest on its First Consolidated Mortgage *Five Per Cent.* Gold Bond No. ....." (emphasis is the court's), and (2) the statement in each Bond that Indianapolis Gas agrees to pay the face amount of the Bond "with interest * * * at the rate of five per cent. per

annum" (IV R. 1305). Obviously, the statement that the $25 to be paid on the coupon is the interest on a 5% Bond has nothing to do with the rate of interest to be paid on the $25 itself, after it has become due and unpaid. Similarly, the fact that the Bond contains an agreement by the mortgagor to pay interest *on the Bond* at the rate of 5% is far from being an agreement that the rate of interest *on the coupons* after their maturity shall be 5%.

The fact is that there is no contractual provision as to the rate of interest on the coupons. Therefore, under the express provisions of the Indiana statutes, the rate of interest on the coupons after their maturity is 6% and the rate of interest on the judgment for the overdue and unpaid coupons is also 6%.

CONCLUSION.

There is no reason to doubt the federal jurisdiction of this case. The fact that plaintiff sought and obtained a judgment against Indianapolis Gas which now amounts to more than $1,700,000 is enough without more to prevent the alignment of Indianapolis Gas with Chase as a party plaintiff. The decisions of this Court and the Circuit Courts of Appeals are unanimous in holding that there will be no realignment for jurisdictional purposes when there is a single substantial controversy between the plaintiff and the defendant sought to be realigned.

The City's claim that it has been denied due process of law is without substance. The decision of the Court of Appeals that the City's allegations of burdensomeness presented no valid defense is clearly right, particularly in view of the decision of the Public Service Commission, the decision of the Indiana Supreme Court in the *Williams* case, and the conduct of the City and Citizens Gas in accepting the benefits of the Lease for nearly 22 years and declaring during the same period that the Lease was valid

and binding on the public charitable trust. No constitutional rights of the City were violated when the Court of Appeals refused to give it an opportunity to prove something which would be wholly immaterial and ineffectual as a defense, even if it were proved.

As to the claim that the Court of Appeals failed to follow the Indiana law, the fact is that its decision is in complete accord with the applicable law of Indiana (except as to the rate of interest on the overdue coupons and on plaintiff's judgment), and in particular, that decision is fully supported by every Indiana decision bearing upon the validity of the very Lease here in question. The City's attempt to have this Court overrule the decision of the Indiana Supreme Court in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212 (1934), holding the Lease to be a binding obligation of the public charitable trust, is contrary to rather than in support of *Erie R. R. Co. v. Tompkins*.

The plaintiff is in the fortunate position of being legally right and at the same time sustained by overwhelming equities. In direct contrast with plaintiff's situation there is nothing in the conduct of the City to recommend its position to the conscience of the Chancellor. For 22 years it consistently took the position that the Lease here in question was valid and binding and on two occasions it assisted in defending the Lease against suits by beneficiaries of the public charitable trust. Through all this period the City insisted that the Lease was beneficial; that the making of the Lease was within the power of Citizens Gas; that the Lease did not prevent carrying out the contract between the City and Citizens Gas; that the decision of the Public Service Commission as to the validity of the Lease could not be collaterally attacked by Williams, a beneficiary of the public charitable trust; and, that "It appearing that the lease * * * has been in full force and effect for nearly 17 years * * * all persons * * * are estopped to question

the validity of the same" (PX Stip. 37, II R. 807, Offered, II R. 328). Finally, as late as June 27, 1935 (less than three months before taking over the property of Citizens Gas), the City sold its Revenue Bonds on the representation that it was about to take over the entire gas system operated by Citizens Gas, including that leased from Indianapolis Gas, and that payment of the bonds would be secured by a charge on the revenues from the entire system to be "owned and/or operated by the City."

In such a situation the decision of this Court in *Union Pacific Ry. Co. v. Chicago, etc. Ry. Co.*, 163 U. S. 564 (1896), should be a guiding light. In that case, which had many points of similarity to the one now before this Court, it was argued that a contract between two railroad companies for a period of 999 years was *ultra vires* and invalid, particularly as interfering with the ability of one of the railroads to render adequate service to the public. This Court sustained the validity of the contract and in an opinion written by Chief Justice Fuller quoted from the opinion of Mr. Justice Brewer, in deciding the case on circuit, as follows (p. 604):

> "It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action."

We submit that the sanctity of contract obligations should be recognized and that parties should not be allowed to accept all the benefits of a contract over a period of 22 years, at the same time affirmatively insisting upon the validity of that contract, and then to repudiate the obliga-

tions under that contract because they believe it advantageous for them to do so.

Respectfully submitted,

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Filed December 7, 1940.

APPENDIX A.

Excerpts From the Public Service Commission Law.

(The Shively-Spencer Act.)

CHAPTER 76—LAWS OF 1913.

(pp. 167-8, 198-202, 214.)

AN ACT concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission.

[*H. 361. Approved March 4, 1913.*]

Public Service Commission.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, That the term "public utility" as used in this act shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, that now or hereafter may own, operate, manage or control any street railway or interurban railway or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public.

The term "municipal council" as used in this act shall mean and embrace the common council, the board of trustees or any other governing body of any town, or city wherein the property of the public utility or any part thereof is located.

The term "municipality" as used in this act shall mean any city or town wherein property of a public utility or any part thereof is located.

The term "rate" as used in this act shall mean and include every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility or any two or more such individual or joint rates, fares, tolls, charges, rentals or other compensations of any public utility or any schedule or tariff thereof.

The term "service" is used in this act in its broadest and most inclusive sense and includes not only the use or

accommodation afforded consumers or patrons but also any product or commodity furnished by any public utility and the plant, equipment, apparatus, appliances, property and facility employed by any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which such public utility is engaged and to the use and accommodation of the public.

The term "commission" used in this act shall mean the public service commission of Indiana hereby created.

The term "indeterminate permit" as used in this act shall mean and include every grant, directly or indirectly, from the state to any corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, of power, right or privilege to own, operate, manage or control any plant or equipment, or any part of a plant or equipment, within this state, for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public, or for the transportation by a street railway or interurban of passengers or property between points within this state, or for the furnishing of facilities for the transmission of intelligence by electricity between points within this state, which shall continue in force until such time as the municipality shall exercise its option to purchase, as provided in this act, or until it shall be otherwise terminated according to law. This act shall be commonly known and referred to as the Shively-Spencer Utility Commission Act.

* * * * *

Transfer or Lease of Property.

SEC. 95. No public utility as defined in section one (1) of this act shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person, or corporation or contract for the operation of its works or system, without the written consent of the commission after a hearing. The permission and approval of the commission to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture.

No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for or engaged in the same or a similar business, or purporting to operate or operating under a franchise from the same or any other municipality unless authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security, only with the consent of the commission empowered by this act to give such consent, shall a corporation foreign or domestic operating a public utility purchase or acquire, take or hold, more than ten per centum (10%) of the total capital stock issued by a corporation doing the same or a similar business: *Provided*, That a corporation now lawfully holding a majority of the capital stock of any corporation operating a public utility may, without the consent of the commission, acquire and hold the remainder of the capital stock of such corporation or any portion thereof.

Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired or to prevent upon the surrender or exchange of said stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of stock, by or through any person or corporation to any corporation, in violation of any provision of this section shall be void and of no effect and no such transfer or assignment shall be made upon the books of any such corporation or be recognized effective for any purpose.

Joint Service—Requirements.

SEC. 951½. That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and any public utility

may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission.

* * * * *

Indeterminate Permit.

SEC. 100. Every license, permit or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit subject to the provisions of this act, and subject to the provision that the license, franchise or permit may be revoked by the commission for cause or that the municipality in which the major part of its property is situated may purchase the property of such public utility actually used and useful for the convenience of the public at any time as provided herein, paying therefor the then value of such property as determined by the commission and according to the terms and conditions fixed by said commission, subject to all the provisions as to hearings and appeals set out in section one hundred and five (105) and section one hundred and six (106) hereof. Any such municipality is authorized to purchase such property and every such public utility is required to sell such property at the value and according to the terms and conditions determined by the commission as herein provided. If this act should be repealed or annulled then all such indeterminate franchises, permits or grants shall cease and become inoperative and in place thereof such utility shall be reinstated in the possession and enjoyment of the license, permit or franchise surrendered by such utility at the time of the issue of the indeterminate franchise, permit or grant; but in no event shall such reinstated license, permit or franchise be terminated within a less period than five years from the date of the repeal or annulment of this act.

Existing Franchises—Surrender.

SEC. 101. Any public utility operating under an existing license, permit or franchise shall, upon filing at any time prior to the expiration of such license, permit or franchise and prior to July 1, 1915, with the clerk of the municipality which granted such franchise and with the commission, a written declaration, legally executed, that it surrenders such license, permit or franchise, receive by operation of law, in lieu thereof an indeterminate permit as provided in this act; and such public utility shall hold such permit under all the terms, conditions and limitations of this act.

Effect of Indeterminate Permit.

SEC. 102. Any public utility accepting or operating under any indeterminate license, permit or franchise hereafter granted shall by acceptance of any such indeterminate license, permit or franchise be deemed to have consented to a future purchase of its property by the municipality in which the major part of it is situate at the value and under the terms and conditions determined by the commission as provided in this act, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be established by the verdict of a jury, and to have waived all other remedies and rights relative to condemnation, except such rights and remedies as are provided in this act and shall have been deemed to have consented to the revocation of its license, permit or franchise by the commission for cause.

* * * * *

SEC. 131. In case any of the provisions of this act shall be held invalid such fact shall not operate to make invalid any other part of this act, and the parts of this act not adjudged to be invalid shall be observed and enforced the same as though the invalid part or parts had not been enacted.

APPENDIX B.

EXCERPTS FROM THE CITIES AND TOWNS ACT OF 1905. (CHAPTER 129—LAWS OF 1905.)

Excerpt From Section 53 of the Cities and Towns Act.

(Laws of 1905, pp. 246-7.)

SEC. 53. The common council of every city shall have power to enact ordinances for the following purposes:

* * * * *

Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out

Note: Clause 6 of Section 53 of the Cities and Towns Act is now section 48-1407 of Burns Indiana Statutes, 1933. This clause has not been changed since its enactment in 1905.

Section 85 of the Cities and Towns Act.

(Laws of 1905, p. 271.)

Contracts and Agreements—When Void.

SEC. 85. No executive department, officer or employe thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations, are declared to be absolutely void: *Provided*, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat, or electricity, and for the collection, removal and disposal of garbage, ashes or refuse, on such terms and for such times, not exceeding the term fixed by section two hundred and fifty-four of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take

effect, and if so approved shall immediately become effective: *Provided, further*, That nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance.

Note: Section 85 of the Cities and Towns Act is now section 48-1507 of Burns Indiana Statutes, 1933. This section has not been changed since its enactment in 1905.

Section 254 of the Cities and Towns Act—As Amended.

CHAPTER 104—LAWS OF 1911.

(pp. 181 et seq.)

Contract for Public Utilities—Limit—Purchase.

SEC. 2. That section 254 of the above entitled act be, and the same is hereby amended to read as follows: Section 254. Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities or to build or extend railroads, interurban or street car lines, telegraph or telephone lines, drainage or sewerage systems, or other public conveniences into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street car, telegraph or telephone services, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants: *Provided*, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five years: *and, Provided further*, That before any such contract shall be made by any city of the first, second, third, or fourth class, such contract shall be first agreed to by the board of public works of such city, after which agreement such board, shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city,

For the purpose of aiding in the erection or extension of any such public utilities and conveniences, any city or town is authorized to become a part stockholder by subscribing to the capital stock thereof in any such corporation so contracting to furnish the city or town and its inhabitants with water, motive power, heat, drainage, sewerage, light and other accommodations aforesaid. And such city or town shall have the power to borrow money to pay for the stock so subscribed or to pay the purchase price for any such gas, electric light, heat or power plant, sewerage or drainage system or other public convenience, and the common council of such city or board of trustees of such town may issue the bonds of such city or town payable at such time or times as such common council or board of trustees may direct, and bearing interest at a rate not exceeding six per centum per annum, payable annually or semi-annually, and may negotiate and sell the same at not less than the face value thereof. The proceeds of such bonds shall be applied only to the payment of the stock so subscribed or to the payment of the purchase price of such gas, electric light, heat or power plant, sewerage or drainage system or other public conveniences: *Provided, however*, That the denominations, time and place of payment of and interest on said bonds shall be in accordance with the terms and provisions of section two hundred and forty-nine of this act.

Note: Section 254 of the Cities and Towns Act is now section 48-7302 of Burns Indiana Statutes, 1933. This section has not been changed since its amendment in 1911.

APPENDIX C.

Excerpts from Chapters 77 and 78 of Laws of Indiana of 1929.

CHAPTER 77—LAWS OF 1929.

(pp. 252, 257, 259-260.)

AN ACT supplemental to an act entitled "An act concerning municipal corporations," approved March 6, 1905.

[*H. 132. Approved March 11, 1929.*]

First Class Cities, Utilities Department.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, First Class Cities, Utilities Department. In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled "An act concerning municipal corporations," approved March 6, 1905, and acts amendatory thereof, there is hereby created in any such city having a population of not less than three hundred thousand (300,000), as shown by the last preceding United States census, a department of public utilities, which shall be under the control of a board of seven (7) members, to be known as the "board of directors for utilities," to be appointed annually by the board herein provided for and designated as the board of trustees for utilities.

* * * * *

Powers and Duties of the Board of Directors.

SEC. 3. Powers and Duties of the Board of Directors. The said board of directors for utilities shall have the exclusive government, management, regulation and control of any water works, gas works, electric light works, heating and power plants, and all property relating thereto, which any such city may heretofore have acquired or may here-

after acquire or construct for the service of the public as consumers, and such board of directors shall be charged with the duty of and shall have all necessary power to make all necessary repairs, renewals, enlargements, extensions or additions to any such plant or property which in the judgment of said board of directors is desirable or necessary for the proper serving of the inhabitants of said city and the adjacent community served with respect to any such utility from any such plant or plants. In connection with the duties devolving upon such board of directors as aforesaid, it shall have power as follows:

* * * * *

(7) To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, and to take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom; and in event there be any outstanding open mortgage upon the property covered by any such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such leased property; and, subject to the approval of the public service commission of Indiana, to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such leased property.

* * * * *

CHAPTER 78—LAWS OF 1929.

(Printed in full.)

(pp. 268-271.)

AN ACT relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes, or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporation to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency.

[*H. 133. Approved March 11, 1929.*]

Gas Corporations, Certain—Conveyance of Property to Municipality—Retirement of Stock.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana,* That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, subject to the outstanding legal obligations of said corporation, whenever the holders or owners of shares of stock, stock certificates, or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be valid and binding upon such corporation and upon the holders and owners of any such shares of stock, stock certificates or beneficial interest

therein or their assigns, and said town or city shall be authorized and entitled to accept a transfer and conveyance of any such property in accordance with the terms and conditions of such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city and without any election being held therein to determine whether such property shall be acquired by such town or city. It shall not be necessary to obtain the consent or approval of the public service commission of Indiana or any other state board, commission or officer for such transfer and conveyance or of the terms and conditions upon which the same is to be made, but such transfer and conveyance shall be valid without any order or approval of such commission, board or officer, and any provisions in such articles authorizing the board of directors, trustees or other officers of said corporation to issue bonds or to mortgage or otherwise encumber such property before such transfer and conveyance for the purpose of borrowing money with which to pay to such holders or owners of such shares of stock, stock certificates or owners of such beneficial interest thereof the face or par value of such shares of stock, stock certificates, together with the interest or dividends provided for in such articles, and authorizing such directors, trustees or other officers to transfer or convey the property of such corporation to such town or city whenever the holders or owners of the shares of stock, stock certificates or any beneficial interest therein have been paid the par or face value of such shares of stock or stock certificates together with the interest or dividends provided for, are hereby legalized and declared to be valid and binding and such directors, trustees or other officers of such corporation shall have the right and power to carry out and perform any such provisions in accordance with the terms of such articles. This act shall apply to any such corporation if organized before May 1, 1913, and in which the aforesaid provisions are contained in the articles of incorporation and which articles have thereafter been amended and in which such amended articles of incorporation such provisions are contained.

Any provisions in either the original articles of incorporation of any such corporation, or in any amendment

thereof, providing for the retirement of the outstanding preferred stock of such corporation before such conveyance is made to any such municipal corporation are hereby legalized and declared valid and binding and said corporation and the officers thereof are authorized to retire such stock in accordance with such provisions and the terms of such preferred stock, and to mortgage such property to secure funds with which to redeem such preferred stock and to pay the holders and owners of the shares of common stock or common stock certificates or of any beneficial interest therein the amounts provided for in such articles, and whenever the outstanding preferred stock in any such corporation shall have been redeemed and the holders and owners of such common stock, common stock certificates or of any beneficial interest therein shall have received the amounts therein provided for in such articles of incorporation, then the property of such corporation shall be conveyed to such municipal corporation in accordance with the provisions of such articles or amended articles of incorporation.

Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city the title to such property shall vest in such town or city, subject to all outstanding legal obligations of said corporation: *Provided, however,* That such town or city shall not be liable for any such obligations and the same shall not constitute a debt of such town or city, but all such obligations shall be a charge upon said property so conveyed, and any mortgage or other lien or encumbrance executed by the board of directors, trustees or other authorized officers of such corporation before such transfer shall continue to be a lien on such property to the same extent as before such transfer or conveyance.

Said municipal corporation shall be authorized to accept, hold and own all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and any right, title or interest such transferring corporation may have in any lease upon other property.

Provided, however, That if in any such municipal corporation there is now or is hereafter created or existing a separate taxing unit or district which shall be subject to taxation to raise money with which to either retire or redeem the stock of any such transferring corporation, or to pay obligations incurred for the benefit of such property, then all such property so transferred to such municipal corporation shall be held thereby in trust for the use and benefit of such separate taxing unit or district, and for the general public.

Repeal.

SEC. 2. That all laws and parts of laws in conflict herewith are hereby repealed.

Emergency.

SEC. 3. An emergency existing for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.